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CONTENTS

CONSENT ISSUE IN MEDICAL INTERVENTIONS APPLIED TO PATIENTS WHO DO NOT HAVE THE CAPACITY TO ACT*

Fiil Ehliyetine Sahip Olmayan Hastalara Uygulanacak Tıbbi Müdahalelerde Rıza Sorunu

Hatice KARACAN ÇETİN**

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Abstract

Life, physical integrity and health are values protected within the scope of personality right. For this reason, medical interventions applied on these values constitute a tort and/or crime unless there is a reason preventing illegality. In medical interventions, this reason often appears as the patient's consent. However, it is not possible to give consent for patients who permanently or temporarily lack the capacity of judgement. In this case, can medical intervention be applied with the consent of the patient's relative or legal representative? If so, what should the representative take into account when giving consent or what should be done if the legal representative refuses to give consent even though medical intervention is necessary and urgent? On the other hand, since consenting to medical intervention is a strictly personal right, it is argued that this right cannot be used through a representative. Despite this, in Turkish Law, there are provisions that still require the consent of the legal representative in medical interventions applied to underage or under guardianship patients, even though they have the capacity of judgement. These provisions cause problems in practice. And in German law, a paragraph (§1358) added to the German Civil Code allowed spouses to represent each other in medical interventions, under certain conditions, for a certain

* There is no requirement of Ethics Committee Approval for this study.
This article is the completed version of the paper titled 'Consent Issue in Medical Interventions Applied to Patients Who Do Not Have the Capacity to Act' which was presented orally at the '8th International Scientific Conference of the Faculty of Law' held in Tetova, North Macedonia between 15-17 November, 2023. English abstract of the paper has published in the congress abstract book.

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period of time. The paragraph, which was accepted after long discussions and entered into force at the beginning of 2023, seems to have brought about greater debates. On the other hand, in Turkish law adults who are under guardianship lose their capacity to act, even if they have the capacity of judgement. As a result, the guardian's consent must be sought for patients in this situation according to the legislation. However, this guardianship system for adults has long been abandoned in German and Swiss law. In our study, current approaches to the consent issue in medical interventions applied to patients who do not have the capacity to act are discussed within the framework of Turkish, German, Swiss laws and international regulations.

Keywords: Medical Interventions, Consent, Capacity of Judgement, Personality Right, Underage Patients, Under Guardianship Patients, Legal Representative

Özet

Hayat, vücut bütünlüğü ve sağlık, kişilik hakkı kapsamında korunan değerlerdir. Bu nedenle söz konusu değerlere yönelik tıbbi müdahaleler, hukuka aykırılığı engelleyen bir neden bulunmadığı sürece haksız fiil ve/veya suç teşkil eder. Tıbbi müdahalelerde bu neden çoğu zaman hastanın rızası olarak karşımıza çıkar. Ancak ayırtım gücünden sürekli veya geçici olarak yoksun hastaların tıbbi müdahaleye rıza vermeleri mümkün olmaz. Bu durumda tıbbi müdahale hastanın yakını veya yasal temsilcisinin rızasıyla uygulanabilir mi? Uygulanabilir ise bu kişiler rıza verirken neleri dikkate almalıdır? Öte yandan tıbbi müdahaleye rıza göstermek kişiye sıkı sıkıya bağlı bir hak olduğundan bu hakkın temsilci aracılığıyla kullanılamayacağı savunulabilir. Buna karşın Türk Hukukunda hasta temyiz gücüne sahip olsa dahi ergin değil veya kısıtlı ise ona uygulanacak tıbbi müdahalelerde yasal temsilcisinin rızasını arayan hükümler bulunmaktadır. Bu hükümler uygulamada sorunlara yol açmaktadır. Alman hukukunda ise Medeni Kanun'a eklenen bir paragraf (§1358) ile eşlerin belirli koşullar altında belirli bir süre için tıbbi müdahalelerde birbirlerini temsil etmelerine yasal olarak izin verilmiştir. Uzun tartışmalardan sonra kabul edilen ve 2023 yılının başında yürürlüğe giren paragraf, daha büyük tartışmaları da beraberinde getirecek gibi görünmektedir. Türk hukukunda ise vesayet altına alınan yetişkinler, ayırtım gücüne sahip olsalar dahi fiil ehliyetini kaybetmektedirler. Sonuç olarak bu durumdaki hastalar için mevzuat gereği vasilerinin rızası aranmaktadır. Halbuki yetişkinlere yönelik bu vesayet sistemi Alman ve İsviçre hukuklarında uzun süre önce terk edilmiştir. Çalışmamızda fiil ehliyeti bulunmayan hastalara uygulanacak tıbbi müdahalelerde rıza konusuna ilişkin güncel gelişmeler Türk, Alman ve İsviçre hukukları ile uluslararası düzenlemeler çerçevesinde ele alınmaktadır.

Anahtar Kelimeler: Tıbbi Müdahaleler, Rıza, Ayırtım Gücü, Kişilik Hakkı, Ergin Olmayan Hastalar, Vesayet Altındaki Hastalar, Yasal Temsilci

Introduction

Today, one of the basic conditions for medical intervention to be lawful is the patient's consent. In order for the patient's consent to prevent unlawfulness, the patient must have the capacity to consent and therefore the capacity of judgement. It is not possible for patients who do not have the capacity of judgement to give consent. In this case, another reason is needed to ensure lawfulness in medical interventions.

There are provisions in Turkish law and other national and international laws stating that medical intervention can be applied to patients who do not have the capacity of judgement, with the consent of the legal representative. However, based on these provisions, it is not easy to say that the consent of the legal representative alone can ensure lawfulness in medical intervention. As a matter of fact, the right to life, physical integrity and health is a strictly personal right. Therefore, it is not possible, as a rule, to exercise this right through a legal or voluntary representative. Some regulations go even further and require the consent of the legal representative for medical interventions to be applied to patients who have the capacity of judgement but underage or under guardianship. Within the framework of the patient's right to self-determination, it is necessary to question how close these provisions are to the ideal.

In the first part of this study, the concept of consent will be discussed in terms of the lawfulness of medical interventions within the framework of personality right and the right to self-determination. In the second part, the issue of consent in medical interventions applied to patients who do not have the capacity of judgement will be discussed. Under this heading, the legal nature of legal representative's consent and the new regulation in German law that came into force at the beginning of 2023 and allows spouses to give consent in medical interventions and to represent each other health-related legal transactions is handled. In the third part, the consent issue in medical interventions to be applied to underage or under guardianship patients, who have the capacity of judgement, will be discussed. Under this heading, the legal regulations requiring the consent of the legal representative in Turkish law for medical interventions to be applied to these patients will be discussed in comparison with the regulations in the German and Swiss Civil Codes.

Finally, our conclusions regarding the consent issue in medical interventions and our recommendations in terms of Turkish law within the framework of protecting personality and realizing the person's right to self-determination are presented.

I. Interventions in personality right and the conditions of lawfulness

A. Concept of Personality Right

'*Personality right*' is defined in the doctrine as '*the right that a person has on all the values that enable him or her to freely develop his or her personality and reputation in society*'. A person's life, health, physical integrity, freedom, honor,

dignity, name, picture, image, private life, secrets, scientific and professional identity are some of these values.[1]

In the Turkish Civil Code (TMK)[2] and the Swiss Civil Code (ZGB)[3], although there are provisions specifically regulating a few of these values (for example, TMK art. 26 and ZGB art. 29, which protect the right to the name), personality right is regulated in general (TMK art. 24 and ZGB art. 28), and the values within the scope of personality right are not listed one by one. Therefore, the judge decides which values will benefit from legal protection within the scope of personality right. While making this evaluation, the judge takes into consideration all legal rules in the field of public and private law, especially the Constitution.[4] For example, according to art. 12 I of the Constitution of the Republic of Turkey (CRT), '*Everyone has fundamental rights and freedoms that are bound to personality, inviolable, inalienable and indispensable.*' According to art. 17 of CRT, *[E]veryone has the right to live and to protect and develop their material and spiritual existence (I). The physical integrity of the person cannot be violated, except for medical necessities and cases written in the law; no one shall be subjected to scientific or medical experiments without his consent (II).*

In the German Civil Code (BGB)[5], the values protected within the scope of personality right are included in different paragraphs. For example, according to §823 I of BGB *[A] person who, intentionally or negligently, unlawfully injures the life, limb, health, freedom, property or some other right of another person is liable to provide compensation to the other party for the damage arising therefrom*. In the same direction in Turkish law, according to art. 24 I of TMK, '*A person whose personality right has been unlawfully attacked may request protection from the judge against those who attack*'. A similar provision is included in art. 28 I of ZGB. As a result, the right that a person has on his or her life, physical integrity and health is also protected within the scope of personality right.

Personality right is an absolute right, because of that it can be claimed against anyone and everyone can be asked not to violate this right. For this reason, any attack that harms this right constitutes a tort unless there is a reason that prevents unlawfulness.[6] In tort law, the reasons preventing unlawfulness can be listed

1 Mustafa Dural and Tufan Öğüz, *Türk özel hukuku Cilt II: Kişiler Hukuku (2*3rd edn, Filiz Kitabevi 2022) 100.

2 Türk Medeni Kanunu, Law No.: 4721, dated 22.11.2001, RG 8.12.2001/24607.

3 Schweizerisches Zivilgesetzbuch, dated 10.12.1907, AS 24 233.

4 Dural and Öğüz (n 1) 101.

5 Bürgerliches Gesetzbuch, Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515).

6 Dural and Öğüz (n 1) 152; Christian Grüneberg and others, *Bürgerliches Gesetzbuch*, vol 7 (82., neubearbeitete Auflage, CH Beck 2023) para §823 BGB, 4.

as '*consent of the injured party*', '*exercise of an authority based on public or private law*', '*overriding private or public interest*', '*self- defense (Notwehr)*' and '*necessity (Notstand)*'.[7]

B. Lawfulness Reasons in Medical Law and the Patient's Rright to Self-determination

Medical interventions pose serious risks to the patient's life, health and bodily integrity. Therefore, medical interventions related to these values protected within the scope of personality right constitute a tort and/or crime unless there is a reason preventing unlawfulness. There are different views in the doctrine explaining why medical interventions should be considered lawful. While one view considers medical interventions to be lawful because they are '*permitted activities by law*', some other views accept that medical interventions are lawful because the doctors '*exercise a right or fulfill a duty given by law*' as part of their profession. On the other hand, there are also views based on the '*overriding interest of the patient*'. '*The permissible risk theory*' argues that medical activity cannot be considered unlawful because it inherently involves risk. However, these views explaining lawfulness based on the medical profession, have been criticized on the grounds that they ignore the patient's right to determine his or her own future (right to self-determination). These views base the lawfulness of medical intervention on the will of the patient within the framework of the patient's right to self-determination.[8]

In medical law, the patient's right to self-determination is defined as '*a right that enables patients who are able to make their own decisions to make their own life choices with their free will, free from any kind of interference*'.[9] Today, in the field of medical law, as an absolute right[10], the right to self-determination is considered as sacred as the right to life, even for this reason, it is stated that euthanasia, which is illegal in Turkish law, should be regulated legally.[11]

In Turkish law '*the right to self-determination*' is protected in many provisions of the Constitution within the scope of personality right (see art. 15, 20 and

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7 Bilgehan Çetiner, Andreas Furrer and Markus Müller-Chen, *Borçlar Hukuku Genel Hükümler* (1st edn, On İki Levha 2021) 357 et seq.

8 For views and criticism see Hasan Tahsin Gökcan, *Tıbbi Müdahaleden Doğan Hukuki ve Cezai Sorumluluk* (4th edn, Seçkin 2022) 296 et seq.

9 Hamide Tacir, 'Hastanın Kendi Geleceğini Belirleme Hakkı' in Hamide Tacir and Aysun Altunkaş (eds), *III. Sağlık Hukuku Kendi Geleceğini Belirleme Hakkı ve Ötanazi Sempozyumu* (1st edn, Seçkin 2016) 45.

10 Hakan Hakeri, 'Patient Autonomy and Criminal Law: A Turkish Perspective' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 354.

11 See Erika Biton Serdaroğlu, 'Ötanazi - Ölme Hakkı' (2016) 22 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 463, 488.

especially art. 17 of CRT). This right is reflected in medical law as '*patient autonomy*'.[12] Art. 17 II of CRT is the legal basis of patient autonomy.[13] Within the framework of this right, the patient does not have to choose what is best for his or her, but can also make choices that are not in his or her own interest, such as refusing treatment.[14] Forcing a patient who refuses treatment to receive it against his or her consent or providing medical intervention to him or her is incompatible with patient autonomy.[15] For this reason, the paternalist doctor model, which has been prominent in medical law since the past, has been criticized on the grounds that it harms patient autonomy.[16] The paternalistic model argues that the patient will not know what will be better for him or her because his level of medical knowledge is not sufficient, therefore it will be wrong for the patient to make a decision; instead, the doctor who knows the patient's well-being better than him or her should make the decision. For this reason, this model is gradually being abandoned, and instead, the patient-doctor relationship called the '*interviewer model*', in the form of client-counselor in communication with the patient, is proposed as the most ideal model.[17]

Within the framework of the '*right to self-determination*', patients must decide with their own free will the treatment process and how they will spend the rest of their life. In Turkish law, the patient's right to refuse treatment is regulated in articles 22 and 25 of the *Patient Rights Regulation* (HHY)[18]. The provision in the regulation that requires withdrawal of consent after treatment has started on the condition that there is no medical risk was removed from the regulation in 2014[19].

In German law, the right to develop one's personality freely is constitutionally guaranteed. According to art. 2 of the German Constitution *[E]veryone has the right to the free development of their personality, provided that they do not violate the rights of others and do not violate the constitutional order or the moral*

12 Gökcan (n 8) 97.

13 Hakeri (n 10) 343.

14 The doctor cannot be held responsible for not providing medical intervention to a patient who refuses to give consent. See ibid.

15 ibid 354.

16 See for criticism Erhan Kılınç, 'Sağlık Kurumlarında Paternalist Liderlik Modelinin İncelenmesi' (2018) 1 Journal of Healthcare Management and Leadership 1, 9.

17 See Elif Atıcı, 'Hasta - Hekim İlişkisi Kavramı' (2007) 33 Uludağ Üniversitesi Tıp Fakültesi Dergisi 45, 49; Nora Scheidegger, 'Patient Autonomy and Criminal Law: A Swiss Perspective' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 332.

18 Hasta Hakları Yönetmeliği, RG 1.8.1998/23420.

19 RG 1.5.2014/28994.

law (I). Everyone has the right to life and physical integrity. The freedom of a person is inviolable. These rights may only be interfered with on the basis of a law (II). Patient autonomy is also defined in German law as the individual's self-determination over his or her body and mind, in the form of freedom to decide on medical procedures and measures.[20] The right to self-determination is also guaranteed in the Swiss Constitution in the fundamental right to life and personal freedom (art. 10 II of the Federal Constitution of the Swiss Confederation). It is accepted that the right to self-determination is to take precedence over the medical necessity of treatment and the patient may refuse medical intervention that would save his or her life.[21] The same approach exists in comparative law in many countries.[22]

Patient autonomy is also expressed in international agreements. According to art. 5 of the Convention on Human Rights and Biomedicine (CHRB) a medical intervention may only be applied after the person has given free and informed consent to it; and before intervention, the person must be given appropriate information about the purpose and nature as well as consequences and risks of it. The person may withdraw consent at any time freely.

Today, as a result of these approaches and legal regulations explained above, '*informed consent*' within the framework of the patient's right to self-determination, as an extension of patient autonomy, is accepted as the basic condition for medical intervention to be lawful.[23] '*Informed consent*' is defined as *[T]he voluntary acceptance of the treatment by the patient after the doctor has adequately and appropriately explained the risks and benefits of the treatment, together with all its alternatives, and the patient has understood it without any hesitation*.[24] The doctor's obligation to inform the patient is clearly regulated in articles 15-20 of HHY in Turkish law.

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20 Dorothea Magnus, 'Patient Autonomy and Criminal Law: A German Perspective' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 117.

21 Scheidegger (n 17) 333.

22 For legal regulations in comparative law see Gökcan (n 8) 111, 112. For a comparative evaluation of national laws in Europe regarding the concept of patient autonomy, see Krzysztof Wala, 'Conclusion: A Comparative Look at the Criminal Law Protection of Patient Autonomy in Europe' in Paweł Daniluk (ed), *Patient Autonomy and Criminal Law: European Perspectives* (Routledge 2023) 354 ed seq.

23 Hakan Hakeri, *Tıp hukuku Cilt I Genel Hükümler* (23rd edn, Seçkin 2021) 260; see also Tacir (n 9) 56; Scheidegger (n 17) 333. For the legal nature of consent to medical intervention in contract law Zekeriya Kurşat, 'Analysis of the Concept of "Consent" in Medical Interventions from a Contract Law Perspective' (2017) 14 Law and Justice Review 53, 53 ed seq.

24 Hakeri (n 23) 289.

C. Legal Nature of Consent in Medical Interventions

Consenting to medical treatment is a strictly personal right.[25] For this reason, it cannot be used through a legal or voluntary representative. However, in order for the patient's consent to prevent unlawfulness, the patient must have the capacity to consent. What is important in terms of consent to medical intervention is the patient's ability to understand, comprehend and decide. The patient must be able to understand and compare, at least in general terms, the basis, risks, effects and results of the treatment to be applied; and the doctor, not the judge, must determine whether the patient has the capacity to consent [26].

Patients who have the capacity of judgement, are full age, and are not under the guardianship, in other words, patients who are fully competent in terms of capacity to act can consent to medical intervention on their own. However, a person may permanently lack the capacity of judgement due to young age, mental illness and similar reasons, or may temporarily lose the capacity of judgement due to shock, fainting and similar reasons. These people, who do not have the capacity of judgement, do not have the capacity to consent. On the other hand, can patients who are underage or under guardianship, but have the capacity of judgement, give consent to medical treatment on their own? These issues will be discussed under separate headings below.

II. Consent issue for patients who do not have the capacity of judgement

A. The Legal Nature and Function of the Consent of the Patient's Legal Representative

We have previously expressed that consenting to medical intervention is a strictly personality right, and therefore must be used personally by the right holder, and cannot be used through a representative. However, in doctrine, strictly personal rights are divided into two group as absolute and relative, and it is accepted that relative ones can also be used by the legal representative. For example, while it is not possible to exercise rights such as engagement and marriage through the legal representative, it is accepted that the legal representative files a divorce case on behalf of the under guardianship person whose spouse commits adultery.[27] In Swiss law, the distinction between these rights is clearly stated in art. 19c of ZGB, which was added to the Code in 2013.[28] Consenting to

[25] Dural and Öğüz (n 1) 106.

[26] Hakeri (n 23) 393, 394.

[27] Mustafa Dural and Suat Sarı, *Türk Özel Hukuku Cilt I: Temel Kavramlar ve Medenî Kanunun Başlangıç Hükümleri* (15th edn, Filiz Kitabevi 2020) 176.

[28] Schweizerisches Zivilgesetzbuch (Erwachsenenschutz, Personenrecht und Kindesrecht) änderung vom 19. Dezember 2008, AS 2011 725; Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenenschutz, Personen- und Kindesrecht), BBl 2006 7001.

medical intervention is also considered a relative personality right and accepted that it can be exercised through a legal representative in doctrine.[29]

In legal systems, medical intervention is also allowed for patients who do not have the capacity of judgement, with the consent of their legal representative (for Turkish law see art. 70 of the Law No. 1219[30]; for German law see §630d I of BGB; for Swiss law art. 378 of ZGB, for international law see art. 6 II and III of CHRB). In fact, in Swiss law, the persons authorized to represent the patient in medical interventions are specifically listed in order as a very crowded group (see art. 378 I of ZGB). However, the legal nature of the consent of the legal representative is controversial in the doctrine.

According to one view, although giving consent to medical intervention is a strictly personal right, it is legally valid for the legal representative to consent to medical intervention in order to protect the interests of the patient who does not have the capacity of judgement. According to another view, there is no real representation here, and the consent of the legal representative only prevents unlawfulness[31], provided that it is for the overriding private interest of the patient. One view even argues that if the patient's overriding private interest can be determined, there is no need for the consent of the legal representative. According to another view, the consent of the legal representative does not replace the consent of the patient; here, the reason that ensures lawfulness is the presumed consent of the patient.[32]

As can be seen, in terms of the lawfulness of medical interventions to be applied to patients who do not have the capacity of judgement, some of the opinions are based on the authority given by the law, while the others are based on the patient's overriding private interest or presumed consent. In our opinion, the consent of the legal representative alone is not sufficient to ensure the lawfulness in medical interventions to be applied to patients who do not have the capacity of judgement. As a matter of fact, there are cases in law where medical intervention is allowed without the consent of the legal representative (for Turkish law see art. 70 of the Law No. 1219 and art. 24 I of HHY; for German law see §630d I BGB; for international law see art. 8 of CHRB). In these cases, another reason should be sought to prevent unlawfulness in medical interventions. In our opinion, for underage patients who have not yet gained the capacity of judgement, this

29 Dural and Öğüz (n 1) 107; Yahya Deryal, *Sağlık hukuku problemleri* (1st edn, Seçkin 2012) 32.

30 Law on the Practice of Medicine and Its Branches (Tababet ve Şuabatı San'atlarının Tarzı İcrasına Dair Kanun), dated 11.4.1928, RG 14.4.1928/863.

31 Saibe Oktay Özdemir, 'Ayırt Etme Gücü Bulunmayan Yetişkinlere Yapılacak Tıbbi Müdahalelere Onay Konusunda İsviçre Hukukunda Yapılan Değişiklikler' (2016) 11 Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 223, 230.

32 For views see Ayça Çakal, *Türk Özel Hukukunda Tıbbi Müdahaleye Rıza* (1st edn, Seçkin 2018) 156, 157.

reason is the '*private interest of them*'. For full age patients who do not have the capacity of judgement, this reason is essentially the '*patient's presumed consent*' within the framework of the patient's right to self-determination. First of all, the patient's presumed consent should be investigated, and if this cannot be determined, medical intervention should be applied, taking into account the patient's private interest.

In Swiss law, in 2013 it is clearly regulated that a person with capacity to act may instruct a natural person or legal entity to take responsibility for his or her personal care or the management of his or her assets or to act as his or her legal agent in the event that he or she is no longer capable of judgement (art. 360 of ZGB)[33]. And according to art. 377 I of ZGB, *if a person lacking capacity of judgement has not given instructions on treatment in a patient decree, the attending doctor shall plan the required treatment in consultation with the person entitled to act as representative in relation to medical procedures*. In this case, the representative shall decide according to the *presumed wishes (mutmaßliche Willen)* and interests of the patient lacking capacity of judgement (art. 378 III of ZGB). A similar regulation is also included in the German Civil Code (see §1827 of BGB). In Turkish law, according to art. 24 V of HHY*, the previously expressed wishes of the patient, who does not have the capacity to consent, regarding medical intervention are taken into account*. However, it is unclear what is meant by '*the previously expressed wishes'* in the regulation (whether it should be written or verbal, or whether it should be expressed to relatives or a doctor).[34]

'*Presumed consent*'[35] can be defined as '*the consent that the patient would give if he or she knew the effects, risks and consequences of medical intervention along with its alternatives*'.[36] In legislation, presumed consent is essentially accepted as a reason that ensures the lawfulness of medical intervention in exceptional cases where consent cannot be obtained (for Turkish law see art. 24 V of HHY; for German law see §630d I of BGB; for Swiss law see art. 379 of ZGB; for international law see art. 9 of CHRB; art. 3.3 and 3.7 of the European Consultation on The Rights Of Patients Amsterdam 28 - 30 March 1994). Apart from these cases, the fact that the legal representative has given consent should not prevent the investigation of the patient's presumed consent. A medical intervention that

[33] The article is amended by No I 1 of the FA of 19 Dec. 2008, in force since 1 Jan. 2013 (AS 2011 725; BBl 2006 7001).

[34] Oktay Özdemir (n 31) 241.

[35] '*Presumed consent*' is a different concept from '*hypothetic consent'*. '*Hypothetic consent*' is defined as the consent that the patient would have given if he or she had been informed enough for the medical interventions applied to him or her by the doctor without giving sufficient information. Gökcan (n 8) 370, 371; Hakeri (n 23) 521.

[36] Hakeri (n 23) 502.

is contrary to known wishes of a patient of age cannot be considered lawful simply on the grounds that the legal representative has consented.

B. Representation of Spouses in Medical Interventions in German Law

In German law, '*Law to Reform Guardianship and Custodianship* (Gesetz zur Reform des Vormundschafts- und Betreuungsrechts)'[37] came into force on January 1, 2023. With the Section §1358 added to BGB in the reform, spouses are allowed to represent each other in medical interventions. In previous reform efforts, targets were set for spouses to legally represent each other.[38] However, this offer was not supported due to the risk of abuse in the representation of adult persons, especially in matters related to assets.[39] With the §1358 of BGB added to the Code in this last reform, spouses are allowed to represent each other, at least limited to matters related to medical treatment.

In §1358 of BGB, the spouse is given the authority to consent to medical interventions and take relevant legal actions, even to decide on measures restricting freedom. According to §1358 I of BGB *[I]f one spouse is legally unable to take care of their health care matters due to unconsciousness or illness (represented spouse), the other spouse (representative spouse) is entitled to act on behalf of the represented spouse*

1. to consent to health examinations, medical treatments or medical interventions or to prohibit them and to receive medical information,

2. conclude and enforce treatment contracts, hospital contracts or contracts for urgent rehabilitation and care measures,

3. to decide on measures in accordance with §1831 IV, provided that the duration of the measure does not exceed six weeks in individual cases, and

4. To assert claims that the represented spouse is entitled to against third parties due to the illness and to assign them to the service providers under the contracts according to number 2 or to demand payment to them.

In order for spouses to consent to medical interventions instead of each other, one of the spouses must first be unable to perform health-related tasks due to loss of consciousness or illness. This regulation aims to ensure compliance with §1814 of BGB regarding the appointment of custodian.[40] In matters listed in §1358 I

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37 BGBl. I, 2021, Nr. 21 from 12.05.2021, p. 882; BT.Drucks. 19/24445.

38 See BT-Drucks. 15/2494, 1.

39 Schmidt-Recla/Beate Gsell and others (eds), *Beck-online Großkommentar zum Zivilrecht* (CH Beck 2023) para BGB §1814, 52.3.

40 Benedikt Jugl, 'Das Gesetz zur Reform des Vormundschafts- und Betreuungsrechts aus notarieller Sicht, Teil 1' (2022) 26 Zeitschrift für die NotarPraxis 401, 401.

of BGB treating doctors are released from their duty of confidentiality towards the representing spouse. This spouse may inspect the medical records relating to these matters and authorize their transfer to third parties (§1358 II of BGB).

In the third paragraph of the §1358 BGB, exceptions to the spouses' authority to represent the other spouse and give consent on his or her behalf in medical interventions and other medical measures are stated. According to §1358 III of BGB; *[T]he authorizations according to paragraphs I and II do not exist if;*

1. *the spouses live separately,*
2. *the representing spouse or the treating doctor knows that the represented spouse*
   a) *refuses to be represented by him or her in the matters mentioned in subparagraph I, numbers 1 to 4 or*
   b) *has authorized someone to manage his or her affairs, insofar as this authorization covers the matters specified in paragraph I, numbers 1 to 4,*
3. *a custodian has been appointed for the represented spouse, provided that his or her area of responsibility includes the matters specified in paragraph I, numbers 1 to 4, or*
4. *the requirements of paragraph I are no longer met or more than six months have passed since the time determined by the doctor in accordance with paragraph IV, sentence 1 number 1.*

As can be seen, in order for spouses to legally represent each other in medical interventions and related legal proceedings, many positive and negative conditions (in §1358 I and III of BGB) must be met at the same time. Who will determine whether all these conditions are met and how can it be proven? Regarding this issue, it is stipulated in §1358 IV of BGB that the doctor who will perform the treatment and against whom the right of representation will be exercised must issue a written document confirming that these conditions have been met. According to first and second subparagraphs of §1358 IV of BGB, *the doctor over whom the right of representation is exercised has to confirm in writing that the requirements of paragraph I are met and the latest point in time at which these have occurred*, *and to present the representing spouse with the confirmation in accordance with number 1 with a written declaration that the requirements of paragraph I are met and that the reasons for exclusion in paragraph III are not met.* It is accepted that the document issued by the doctor will only serve to prove the spouse's authority to represent, and will not have a constitutive effect nor will it protect good faith [41].

The doctor will issue this document based on the written assurance received from the representative spouse. According to third subparagraph of §1358 IV of

[41] ibid 402.

BGB *the doctor must obtain written assurance from the representing spouse that a) the right of representation has not yet been exercised due to unconsciousness or illness, due to which the spouse cannot legally take care of his health care matters and b) there is no reason for exclusion in paragraph III.*

According to fifth subparagraph of §1358 of BGB if a custodian whose scope of duties includes the matters is appointed to represented spouse the right of representation may no longer be exercised by the other spouse. The last subparagraph of the provision refers to custodianship law. The referred sections of BGB are §1821 II- IV, §1827 I-III, §1828 I-II, §1829 I-IV, and §1831 IV in conjunction with paragraph II. However, §1831 I BGB is not mentioned among the references. For this reason, an accommodation that involves deprivation of liberty is not possible with the consent of the representative spouse.[42] Likewise, since there is no reference to §1832 BGB, it is accepted that the measures foreseen therein should not be applied, even though they are mentioned in §1358 I BGB. [43] These measures can only be implemented by appointing a custodian.

Section §1358 of BGB is seen as a compromise between the legislator's goals in ensuring that spouses represent each other and preventing abuses.[44] However, the provision has been criticized from many aspects. At first, it is stated that the provision is contrary to the UN Convention on the Rights of Persons with Disabilities, which stipulates that legal representation should be avoided.[45] On the other hand, since the provision stipulates too many conditions regarding the power of representation, and it can only be used in certain health problems, with certain measures and limited for a period of time, it will often be concluded that the spouse does not have the authority to represent, and the goal of preventing the appointment of a custodian will not be achieved. The provision also contains significant uncertainty for the treating doctors. It is especially difficult for the doctor to interpret exceptions to the representation. The doctor will not be able to control issues such as the separation of spouses or whether the spouse to be represented refuses representation, and he or she will have to rely entirely on the information provided by the representative spouse. If there is more than one doctor, the document prepared by the doctor may cause confusion rather

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42 Dagmar Brosey and Georg Dodegge, 'Rechtliche Betreuung und freiheitsentziehende Maßnahmen nach der Betreuungsrechtsreform : Impulse aus der Expertenkommission "Herausforderndes Verhalten und Gewaltschutz in Einrichtungen der Behindertenhilfe" NRW' (2023) 32 Betreuungsrechtliche Praxis 48, 49.

43 See ibid; see also Jugl (n 40) 402.

44 See Sebastian Zander, 'Auswirkungen der Vormundschafts- und Betreuungsrechtsreform auf die notarielle Praxis' (2022) 88 Zeitschrift für das Notariat in Baden-Württemberg 320, 325.

45 Georg Dodegge, 'Die Entwicklung des Betreuungsrechts bis Juli 2022' (2022) 36 Neue juristische Wochenschrift 2590, 2597.

than explanation.[46] Due to these ambiguities, it is estimated that §1358 of BGB, which gives spouses the authority to represent each other in medical matters, will create more problems than benefits in medical practices.[47]

In order to eliminate the ambiguities explained above, it is suggested that if the person refuses to be represented by his or her spouse, this should be recorded in the central registry of the Federal Chamber of Notaries, and the refusal of representation by the spouse should be clearly stated in the divorce and separation agreements.[48] However, recording the will regarding rejection of representation in the central registry will require an economic expense, and it is possible that the need for treatment may arise before the spouse has the opportunity to make this registration. On the other hand, the doctor who issued the representation document will also need to be given the authority to examine the central registry. [49]

C. Representation of Spouses in Medical Interventions in Swiss Law

In Swiss law, according to art. 374 I of ZGB*, any person who as spouse or registered partner cohabits with a person who is no longer capacity of judgement or who regularly and personally provides that person with support has a statutory right to act as that person's representative if there is no advance care directive and no deputy has been appointed*. In the art. 378 of ZGB, the persons who have the right to represent the patient who does not have the capacity of judgement and to consent or refuse the treatments to be applied to him or her are specifically listed in order. Spouses and registered partners are in third place in this provision.[50] The spouse or registered partner, who is the legal representative of the patient, must comply with the instructions of the patient, if any according to art. 370 of ZGB, while exercising his or her authority of representation in medical treatments and giving consent to the medical interventions to be applied to the patient.[51]

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46 For criticism see Jugl (n 40) 402.

47 See Benedikt Jugl, 'Das Gesetz zur Reform des Vormundschafts- und Betreuungsrechts aus notarieller Sicht, Teil 2' (2023) 27 Zeitschrift für die NotarPraxis 3, 6.

48 Jugl (n 40) 403.

49 Herbert Grziwotz, 'Struktureller Wandel des Betreuungsrechts?' (2020) 53 Zeitschrift für Rechtspolitik 248, 251.

50 In Turkish law, based on art. 14 of the Law on Organ and Tissue Removal, Storage, Vaccination and Transplantation (Law No. 2238, dated 29.5.1979, RG 3.6.1979/16655), it is argued that the consent of the patient's spouse should be sought first for patients who do not have the capacity to consent. Hakeri (n 23) 395, 396.

51 Oktay Özdemir (n 31) 237.

III. Consent issue for underage or under guardianship patients who have the capacity of judgement

In Turkish law according to art. 16 of TMK, underage or under guardianship patients who have the capacity of judgement can use their strictly personal rights on their own, without needing the consent of the legal representative. Therefore, as long as they have the capacity to consent, they should be able to consent to medical intervention on their own. However, special legal regulations in the field of health law (art. 70 of the Law No. 1219, art. 24 I of HHY), which are older than TMK, require the consent of the legal representative for these patients. Due to these regulations, for example, a 16-year-old child who has the capacity of judgement cannot receive treatment from the hospital for dental treatment, on the grounds that she does not have her parents with his or her. These regulations, which contradict the art. 16 of TMK, have led to the emergence of different opinions in the doctrine.

For underage patients, while one view considers the underage's consent sufficient, another view requires the consent of both the underage and the legal representative. According to another view, although the opinion of the underage should also be taken, this is not binding and the consent of the legal representative is required. About under-guardianship patients, in Turkish doctrine, it is accepted that people who are put under guardianship for any reason other than minor age, mental illness or mental weakness can consent to medical intervention on their own.[52] In German and Swiss law, since full age people with the capacity of judgement have capacity to act, there is no need for the consent of the legal representative (for German law see §104 BGB, for Swiss law see art. 13 of ZGB).

Conclusions and recommendations

The right to self-determination is a strictly personal right. Every patient who has the capacity to consent should be able to decide or reject the medical intervention to be applied to his or her with their free will. On the other hand, the right to self-determination does not end with the loss of the capacity of judgement. For this reason, medical intervention on a patient who has previously declared that he or she refuses any treatment is unlawful, even if the legal representative consents. Therefore, for the patients who do not have the capacity of judgement, their presumed consent should first be investigated. The legal representative must also take into account the wishes of the person he represents when giving consent. Although spouses are allowed to represent each other in exceptional cases in medical interventions in BGB, time will tell the consequences in practice of the regulation, which has been criticized in many aspects.

[52] For views see Çakal (n 32) 79–85; Gökcan (n 8) 321, 322; Dural and Öğüz (n 1) 107.

In our opinion, regulations requiring the consent of the legal representative for underage or under guardianship patients who have the capacity of judgement are not compatible with the protection of personality. Within the framework of the right to self-determination, these patients must be able to give their consent to medical intervention on their own. In Turkish law, the people of age lose their capacity to act with the placement under guardianship, even if they have the capacity of judgement; and the consent of the legal representative is required for medical interventions to be applied to them. However, in German and Swiss law, the people of age have the capacity to act as long as they have the capacity of judgement. For this reason, within the framework of the individual's right to self-determination, the conditions for consenting to medical intervention as a legal representative and the conditions of capacity to act for people of age should be rearranged in Turkish law.

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PALESTINIAN REFUGEES IN GAZA: THE UNRWA AND BEYOND*

Gazze'deki Filistinli Mülteciler: UNRWA ve Ötesi

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Abstract

After 7 October 2023, already problematic Palestinian–Israeli ties turned into a catastrophe. Some legal issues have arisen because of the impossibility of departure from the Gaza Strip and the difficulties Palestinians in Gaza have experienced in receiving protection from the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) because of ongoing bombardment. To explain the dire circumstances in Gaza and the difficulties of receiving aid from UNRWA, this Article turns its attention to Advocate General Nicholas Emiliou for C-563/22 of the Court of Justice of the European Union. Advocate General Emiliou explains why Palestinian refugees can seek protection elsewhere besides the UNRWA. Suppose that, in a relevant asylum application, the Palestinian applicant could argue that UNRWA's protection has ended, given the continuing undignified living conditions in the Gaza Strip. In that case, we must consider if it is feasible for the person concerned to get protection elsewhere. First, this Article walks readers into history to identify the root causes of the Palestine–Israel conflict. Second, pondering the opinion of the Advocate General and the relevant international legal regulations, this article explains where and by whom protection can be anticipated for Palestinian refugees other than UNRWA. This Article settles that the reluctance of some states to protect refugees puts Palestinians' protection claims in jeopardy.

Keywords: Palestine, statelessness, refugee, asylum seekers, protection of refugees, UNRWA, Court of Justice of the European Union

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Özet

Hali hazırda sorunlu olan Filistin-İsrail ilişkileri, 7 Ekim 2023 tarihinden sonra bir felakete dönüşmüştür. Gazze Şeridi'nden ayrılmanın imkansızlığı ve devam eden bombardımanın etkisiyle, Gazze'deki Filistinlilerin Birleşmiş Milletler Filistinli Mültecilere Yardım ve Bayındırlık Ajansı'ndan (UNRWA) koruma almakta yaşadıkları zorluklara bağlı olarak bazı hukuki sorunlar ortaya çıkmıştır. Gazze'de ortaya çıkan vahim koşulları ve UNRWA'dan yardım almak hususunda vuku bulan zorlukları açıklamak amacıyla bu makale, Avrupa Birliği Adalet Divanı'nın C-563/22 sayılı davasına ilişkin Avrupa Birliği Adalet Divanı Başsavcısı Nicholas Emiliou'nun verdiği görüş paylaşımını incelemektedir. Başsavcı Emiliou, Filistinli mültecilerin neden UNRWA dışında başka bir yerde koruma arayabileceğini bahsi geçen görüş paylaşımında açıklamaktadır. İlgili bir sığınma başvurusunda, başvurucu Filistinlinin, UNRWA korumasının Gazze Şeridi'nde süregelen insan onuruna yakışmayan yaşam koşulları dikkate alındığında sona erdiğini ileri sürebileceğini varsayalım. Bu durumda, ilgili kişinin başka bir yerde koruma aramasının mümkün olup olmadığını dikkate almalıyız. İlk olarak, makale okuyucuların Filistin-İsrail çatışmasının temel nedenlerini anlamalarını sağlamak amacıyla ilgili tarihi gelişmelere dikkati çeker. İkinci olarak, Başsavcı'nın görüşlerini ve mevcut uluslararası yasal düzenlemeleri dikkate alarak, UNRWA dışında Filistinli mültecilerin korunmasının sağlanması hususunun nereden ve kim tarafından gerçekleştirilmesinin beklenebileceğini açıklar. Bu makale, bazı devletlerin mültecileri koruma konusundaki isteksizliğinin aynı zamanda Filistinlilerin koruma taleplerini tehlikeye attığını ortaya koyar.

Anahtar Kelimeler: Filistin, vatansızlık, mülteci, sığınma arayan kişiler, mültecilerin korunması, UNRWA, Avrupa Birliği Adalet Divanı

Introduction

Palestinian-Israeli relations have reached an impasse with the attack of Hamas on Israel. On 9 October 2023, the World witnessed how Israel, in its retaliation, began employing such disproportionate bombardments. In the meantime, on the given date above, the Gaza Strip, bordering Israel and Egypt, fell into complete darkness – as Israel enforced a total siege on the enclave by closing its borders and electricity.[1]

In addition to the already problematic situation in Gaza, another troubling setback occurred due to the closure of border gates connecting Gaza to the outside World. Seven border crossings exist to move people and goods into and out of

[1] Ruby Mellen and Szu Yu Chen, 'See how Israel's siege has plunged Gaza into darkness and isolation' (*The Washington Post*, 30 October 2023) <https://www.washingtonpost.com/world/2023/10/26/gaza-israel-siege-blackout-isolation/> accessed 1 December 2023.

the Strip. History proves that Israel has used such border crossings to control the Gaza Strip by closing its doors on and off. For example, in 2007, Hamas took over Gaza. The Israeli authorities brought movement restrictions, resulting in the isolation of the Gaza Strip from the occupied Palestinian territory (oPt). Gaza Strip back then was blocked through land, sea, and air, which limited *"the number and specified categories of people and goods allowed in and out through the Israeli-controlled crossings"*.[2] For example, in August 2022, Israel closed the only commercial crossing into Gaza -the Karem Abu Salem/Kerem Shalom crossing, resulting in a fuel embargo. This fuel embargo caused chain events: Gaza's power plant was shut down, electricity availability dropped to four to six hours a day, and the water supply to homes decreased.[3] The Rafah border crossing is lifesaving – considering it connects the Gaza Strip to Egypt. However, we see that, like in current times, for over 20 years, the Rafah border crossing has often been closed. For example, the movement of people and goods to and from Gaza was restricted, which undermined the living conditions of 1.9 million Palestinians in Gaza in the early 1990s. Such restrictions were intensified in June 2007 following the Hamas takeover of Gaza, and in 2023, because of the complete siege, people in Gaza have been stuck and have no choice but to remain in the Strip.[4]

Closing the border gates left Palestinians in legal limbo concerning their protection. First, the fact that Palestinians cannot escape the ongoing war *conflicts* with the principle of non-refoulement.[5] Because, in principle, Palestinian people stuck at Rafah's front gates could not be turned away for entrance in consideration of the non-refoulement principle. However, the reality and the principle tell two completely different stories. For example, as is detailed below,

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2 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Gaza Strip the Humanitarian Impact of 15 Years of The Blockade', 2022 <https://www.un.org/unispal/document/gaza-strip-the-humanitarian-impact-of-15-years-of-the-blockade-june-2022-ocha-factsheet/> accessed 27 November 2023.

3 United Nations Human Rights Office of the High Commissioner (OHCHR), 'Israel/OPT: Respecting Fundamental Rights in Gaza is Pre-Condition to Achieving Peace, says UN Human Rights Expert' (2020) <https://www.ohchr.org/en/press-releases/2020/09/israelopt-respecting-fundamental-rights-gaza-pre-condition-achieving-peace> accessed 27 November 2023.

4 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), 'Gaza crossings: movement of people and goods' <https://www.ochaopt.org/data/crossings> accessed 28 November 2023.

5 Hathaway explains that *"a person is a refugee in consequence of his or her de facto circumstances… border officials will inevitably be confronted by persons legally entitled to the provisional benefit of the robust duty of non-refoulement as soon as they come under that state's jurisdiction".* James C Hathaway and Thomas Gammeltoft-Hansen, "Non-Refoulement in a World of Cooperative Deterrence" (2015) 53 Colum. J. Transnat'l L. 2, 238.

not only did Egypt close its border gates, but it also did not offer any means for Palestinians' protection. Border closures have turned Gaza into an open-air prison for Palestinians.

We must understand to what extent UNRWA can protect Palestinians who cannot cross the border in the current situation. The UNRWA's role in the region is vital as it has been the only international organisation engaging with a specific refugee problem in a particular geographical area, including Gaza, the West Bank, Jordan, Syria, and Lebanon.[6] UNRWA's mandate is considered temporary, yet considering it has been renewed every three years, the Agency has operated for more than half a century.[7] However, one of the biggest challenges the UNRWA has faced since 7 October 2023 is the monetary finding that the Agency should receive from powerful Western states. As Bocco explains, financial matters are one of the weaknesses of the UNRWA since *"funding is guaranteed only by the voluntary contributions of donor countries"*.[8] As the UNRWA makes it public, nine countries, including the USA, have temporarily suspended their funding to UNRWA, which threatens lifesaving humanitarian work not only across the region but also especially in the Gaza Strip.[9] Adding to this concern, the head of the UNRWA, Philippe Lazzarini, in his letter to the President of the UN General Assembly, Dennis Francis, wrote the following: *"[o]ur staff take their children to work so they know they are safe or can die together"*.[10] Lazzarini has concrete reasons to fear, as numbers of Palestinians were killed after Israel struck a UNRWA school,[11] which had been used as a shelter for civilians forced out of their homes because Israel was bombing Gaza. As of 14 December 2023, UNRWA confirms that *"133 UNRWA colleagues have been killed since October 7"*.[12] Israel also struck the Jabalia refugee camp in northern Gaza after airstrikes

6 Riccardo Bocco, 'UNRWA and the Palestinian Refugees: A History within History' (2009) 28 Refugee Survey Quarterly 2-3, 231.

7 ibid 233.

8 ibid 233.

9 UNRWA, 'UNRWA's Lifesaving Aid May End Due to Funding Suspension' (27 January 2024) <https://www.unrwa.org/newsroom/official-statements/unrwa's-lifesaving-aid-may-end-due-funding-suspension> accesssed 5 February 2024.

10 UNRWA, 'Letter From UNRWA Commissioner-General Philippe Lazzarini To The UN General Assembly President Mr. Dennis Francis' (7 December 2023) https://www.unrwa.org/resources/un-unrwa/letter-unrwa-commissioner-general-philippe-lazzarini-un-general-assembly accessed 20 December 2023.

11 Middle East Monitor, 'Palestinians killed as Israel strikes UNRWA school housing refugees' (13 December 2023) <https://www.middleeastmonitor.com/20231213-palestinians-killed-as-israel-strike-unrwa-school-housing-refugees/> accessed 11 January 2024.

12 UNRWA, 'UNRWA Situation Report #47 On the Situation in The Gaza Strip and The West Bank, Including East Jerusalem' (8 December 2023) <https://www.unrwa.

on the area.[13] Across the Gaza Strip, over 60 per cent of the housing units have been damaged, leaving these buildings unliveable.[14]

Considering the current situation both in Gaza and the possibility of UNRWA's inability to support Gazans fully, although people in Gaza have nowhere to go at the time of this Article's writing, the concern has arisen in front of the Court of Justice of the European Union (CJEU) about Palestinian stateless refugees already outside of Occupied Territory of Palestine. Palestinians registered with UNRWA cannot obtain refugee status from other institutions/unions outside of Palestine to avoid *competence overlap*[15] between institutions. However, in accepting the failure of the UNRWA's protection capacity, the concern is whether Palestinians registered with UNRWA can turn to other institutions/unions for international protection.[16]

Concerning the last posed enquiry above, if we accept that UNRWA's protection capacity has ceased to exist, that will lift the deadlock regarding the concern around competence overlap, for instance, between UNRWA and the United Nations High Commissioner for Refugees (UNHCR) or alternative avenues for them to receive international protection, such as from Arab nation-states or European states. Discussing available options on the state level also requires understanding whether international law offers a map of rules that will guide countries to protect refugees in the general sense and Palestinians in particular.

This Article discusses the queries stated in the paragraphs above by connecting

org/resources/reports/unrwa-situation-report-47-situation-gaza-strip-and-west-bank-including-east-Jerusalem#> accessed 11 January 2023.

13 Thomson Reuters, 'Israel confirms it struck Jabalia refugee camp; Gaza health official says dozens killed' (*CBC,* 31 October 2023) <https://www.cbc.ca/news/world/israel-hamas-war-gaza-1.7013540> accessed 4 December 2023).

14 OCHA Reliefweb, 'Hostilities in the Gaza Strip and Israel | Flash Update #52 [EN/AR/HE]' (27 November 2023) <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-52-enarhe> accessed 5 December 2023.

15 UNHCR explains the competence overlap as in the following:

> While paragraph 1 of Article 1D is in effect an exclusion clause, this does not mean that certain groups of Palestinian refugees can never benefit from the protection of the 1951 Convention. Paragraph 2 of Article 1D contains an inclusion clause ensuring the ipso facto entitlement to the protection of the 1951 Convention of those refugees who, without having their position definitively settled in accordance with the relevant UN General Assembly resolutions, have ceased to receive protection or assistance from UNRWA for any reason.

UNHCR, 'Revised Note on the Applicability of Article 1D' <https://unispal.un.org/pdfs/UNHCR_PalRefugees-1951Conv.pdf> accessed 9 May 2024.

16 Advocate General's Opinion in Case C-563/22 | Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite (Refugee status – Stateless person of Palestinian origin) 11 January 2024 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-01/cp240006en.pdf> accessed 15 January 2024.

them with the opinion of Advocate General Nicholas Emiliou for C-563/22 of the CJEU.[17] Note that Advocates General do not make binding decisions. They present their approaches to the cases. Advocate Generals practically advise the CJEU on deciding a case, and their views are considered influential.[18] The dispute, subject to C-563/22 before the CJEU, arose before 7 October 2023 in the main proceedings. However, the journey of Palestinian stateless refugees (SN and LN) in pursuing an application for international protection in another state (Bulgaria) can also shed light on Palestinians who will pertain to international protection in the future. For this reason, the application of SN and LN and their asylum-seeking journey that extends to the present day will be detailed in the relevant part of this Article by examining the legal process in the local court with the help of the information extracted from the Advocate General's opinion for the CJEU.

As will be seen, in his opinion, Advocate General Emiliou concludes that *"Palestinian applicants for refugee status can claim that UNRWA's protection has 'ceased' in the light of the general living conditions prevailing in the Gaza Strip".*[19] This statement means that, unlike any other asylum procedure which demands applicants' proof of evidence to demonstrate that the applicant has been targeted or affected by the alleged conditions on a personal level, taking into account the circumstances in Gaza, this requirement is not applicable here. The Advocate General draws attention to the challenges the UNRWA has been facing to protect Palestinian stateless refugees by reflecting on undignified living conditions in Gaza. Advocate General, in his opinion, further states that *"competent national authorities must consider not only the reasons that led the applicants to leave UNRWA's area of operation, but also whether it is currently possible for them to return there."*[20] This approach opens the door for further enquiry, as this Article takes on where then protection is available for Palestinians in a scenario that allows them to leave the Gaza Strip or if they have already been outside of this territory.

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17 Considering the past and present situation in Gaza and Palestinian stateless persons' refugee status, in addition to the enquiry of having a dignified living in Gaza upon a possible return, Advocate General Emiliou aimed to resolve the following:

> [C]an UNRWA's protection or assistance be regarded as having 'ceased', in the light of the living conditions generally prevailing in that area, without it being necessary for the persons concerned to show that they are specifically targeted or affected by those conditions by reason of factors particular to their personal circumstances? Advocate General's Opinion in Case C-563/22 (n 16).

18 European Parliament Briefing Court of Justice at Work, 'Role of Advocates General at the CJEU' <https://www.statewatch.org/media/documents/news/2019/oct/ep-briuefing-a-g-cjeu.pdf> accessed 23 January 2023.

19 Advocate General's Opinion in Case C-563/22 (n 16).

20 ibid.

Aleinikoff and Owen, in their analysis, point out that those countries of the Global South, proximate to refugee-producing states, *in principle,* have no choice but to admit refugees morally and legally. This result happens due to porous borders and the non-refoulement principle.[21] Suppose we apply this approach to the Palestinians' situation. Can then Palestinian stateless refugees be protected here or there? The competent national authority in this scenario can be a neighbouring state or a nation geographically far away, such as a European state. The mentioned countries regarding the enquiry of Palestinian stateless individuals' protection here primarily constitute Lebanon, Jordan and Egypt. These states have problematic aspects in terms of accepting and protecting refugees in a general sense. Regarding the possibilities for Palestinians seeking refuge at the European state level, since the Advocate General gives his opinion for the CJEU, our attention to Europe is also essential to understand the challenges Palestinians may face at the European level.

Although the issues mentioned earlier - the role of UNRWA, the protection of Palestinians, and the general acceptance of Palestinians and refugees by Palestine's neighbouring states and other countries - have been examined in the literature, the novelty of this article lies in the following. Since October 2023, despite the existence of allegations, findings, and data that Israel's actions amount to genocide, and despite the CJEU prosecutor's opinion on UNRWA's lack of capacity to protect, still many world powers maintain their silence in the face of what is happening to Palestinians, and despite the Palestinians' ongoing agony, standing as receiving little to no support, in the 21st century. Therefore, this article highlights the current developments regarding Palestine- Israel's tumultuous relationship by referring to the CJEU prosecutor's opinion to establish that when it comes to Palestinians' protection why we *still* need to reconsider UNRWA and beyond. As in the following, all the mentioned issues are clarified through a critical lens.

1. Palestinians' Agony and the 1951 Refugee Convention's Exclusion Clause[22]

In his book *A Short History of Decay*, Cioran states that if we had a correct understanding of our position in the World, if the comparison were inseparable

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21 T Alexander Aleinikoff and David Owen, 'Refugee protection: 'Here' or 'there'?' (2022) 10 Migration Studies 3, 465.

22 Susan M Akram explains that far from being *"an exclusionary clause, it was intended as a contingent inclusion clause"*. As the 1951 Refugee Convention's relevant provision (Article 1D) that is being referred as exclusion clause *"was intended to ensure continued protection and assistance to Palestinian refugees at all times"*. Susan M Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002) 31 Journal of Palestine Studies 3, 39.
See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).

from living, the revelation of the smallness of our existence would crush us. But to live is to become blind to one's dimensions.[23] It is difficult or almost impossible to fight against any understanding that develops a reflex of blindness to reality. However, the truth of the Palestine–Israel conflict is blurred due to a one-sided historical viewpoint. The Western liberal democracies are stuck in the Holocaust so profoundly that it prevents them from opening their eyes to the Palestinians' agony, which has historical root causes, too. The following paragraphs, therefore, will discuss the Palestinians' agony from philosophical, historical, and legal viewpoints by referring to several scholars' opinions, not the stance of Western politicians. The Article in this part employs a philosophical approach because any discussion of people's suffering requires an understanding that can provide a philosophical meaning. Today's conflict cannot be well understood without considering the historical evolution of Palestine-Israeli relations. Lastly, we must comprehend the Palestinians' status under international law to grasp the UNRWA's role and the exclusion clause that sets the boundaries for Palestinians regarding from whom they can receive protection. All of these approaches will be provided briefly, as each aspect has been discussed and analysed in detail by scholars who have specialised in these particular matters.[24]

We can explain the Palestinians' agony by focusing on Nina Gren's profound question. Nina Gren asks, *"[h]ow do people make sense of and handle continuing violence and years of hardship and want?"*[25] Gren answers this question by formulating the term *illusio*. As she indicates, developing such endurance in the face of continuing violence may seem impossible for an outsider. However, an insider living in incessant hardship may get into an illusio, which triggers resilience in human beings. Palestinian people whose lives are at stake due to ongoing persecution are, in fact, not devoid of ambitions for a different tomorrow. On the contrary, adds Gren, *"overwhelming resignation may create hope that, for an outsider, may seem improbable or even a fantasy"*.[26] This last sentence

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[23] Emil Michel Cioran, *Çürümenin Kitabı* (ASYAM Yayıncılık, İlk Baskı 2000, Metis, On İkinci Basım, 2023), 13.

[24] See Atıf Ebu Seyf, *Filistin Kampında Bir Ömür* (İnkılab Yayınları, 2021); Ingela Bendt and James Downing, *Geri Döneceğiz - Mülteci Kamplarında Filistinli Kadınlar* (Kıyı Yayınları, 1987); Antony tenstein, *The Palestine Laboratory: How Israel Exports the Technology of Occupation Around the World* (Verso, 2023); Alaa Tartir, Timothy Seidel and Tariq Dana, *Resisting Domination in Palestine: Mechanisms and Techniques of Control, Coloniality and Settler Colonialism* (Bloomsbury Publishing, 2024); Michael Barnett, Nathan J. Brown, Marc Lynch and Shibley Telhami (eds), *The One State Reality: What Is Israel/Palestin?* (Cornell University Press, 2023).

[25] Nina Gren, *Occupied Lives Maintaining Integrity in a Palestinian Refugee Camp in the West Bank* (AUC Press, November 2015), 2.

[26] Nina Gren, 'Palestinian conflict: how despair can drive people to violence, even if it puts their lives in danger', (The Conversation, 13 November 2023), published:

explains the meaning behind the illusio, first defined by Bourdieu in *Pascalian Meditations*.[27]

Applying the notion of illusio to Palestinians' ongoing persecution, for some scholars, what Palestinians have been experiencing for years has similarities to what black people went through during times of apartheid in South Africa between 1948 and 1994. Gren gives the example of the Dheisheh camp for Palestinian refugees, where inhabitants living in the camp faced the following: curfews, nightly arrests, house demolitions, shootings, threats, and occasional beatings by Israeli soldiers. Palestinian people were stopped and held at checkpoints. Further, Israel constructed a barrier to unattached the occupied territories from Israel, which aimed at separating Palestinians and Israelis from each other and Palestinians from Palestinians.[28] Israeli authorities enforced a blockade on the Gaza Strip, which resulted in the separation of Gaza from the West Bank. As the Euro-Mediterranean Human Rights Network (EMHRN) explains, this separation policy restricted the movements of Palestinians, such as students in Gaza were prevented from receiving education in West Bank universities, patients could not obtain healthcare, and families were unconnected.[29] People in Palestine living under occupation and bombardment have developed illusio, which is the gist of maintaining a life under constant life-threatening circumstances.

Why, then, has there been a constant struggle for Palestinians? From a historical point of view, Albadawi explains that the Palestinian–Israeli conflict has ties with the conception of modern Zionism. Zionism is a political movement, and in the beginning, it aimed at establishing a Jewish state in Palestine. The state of Israel was declared in 1948. As a result, thousands of Palestinians were forcibly removed from their homeland – which is referred to as *Al Nakba* and considered the root cause of the Palestinian refugee problem that still exists today.[30] Regarding *Al Nakba*, Masalha describes the persecution of Palestinian people as ethnic cleansing and politicide.[31]

October 13, 2023 7.17pm CEST. <https://theconversation.com/palestinian-conflict-how-despair-can-drive-people-to-violence-even-if-it-puts-their-lives-in-danger-215497> accessed 22 January 2023.

27 Pierre Bourdieu, *Pascalian Meditations* (Standford University Press, 2000), 207.

28 See Gren (n 1).

29 Euro-Med Human Rights Monitor. 'Suffocation and Isolation 17 Years of Israeli Blockade on Gaza', published: October 25, 2023<https://euromedmonitor.org/en/gaza> accessed 25 December 2023.

30 Sobhi Albadawi, "Is the right of return still desirable and sacred among Palestinian refugees?" (2021) 23 The British Journal of Politics and International Relations 1, 43.

31 Nur Masalha, *The Palestine Nakba Decolonising History, Narrating the Subaltern Reclaming Memory* (Zed Books Ltd, 2012), 7.

Considering the continuing violence and displacement, Asem Khalil 'categorises' Palestinian refugees in three folds: First, displaced Palestinians from their place of origin. The second category is displaced Palestinians from their places of birth because of the 1967 war. Third, Palestinians who are outside the area of the former Palestine and are unable to return or are unwilling to do so owing to a well-founded fear of persecution. The third category of Palestinian refugees is mainly unable to return because of *"revocation of residency, denial of family reunification, and deportation"*.[32] For that reason, the issues surrounding Palestinian people should also be considered as matters of the rights of the displaced indigenous population and concern regarding self-determination. UN General Assembly Resolution 194 para 11 confirms the stated aspects here:

> [T]he refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.[33]

The above-given paragraphs show the persecution that Palestinians have faced throughout history. Concerning the present day, the evidence indicates that perpetual persecution continues to exist. Indeed, right after the conflict erupted between Israel and Palestine in October 2023, the situation was analysed from different angles to grasp 'what is going on in Gaza' from a legal point of view. Jérôme de Hemptinne, for example, found the classification of the Gaza conflict under international humanitarian law complicated.[34] Raphael Van Steenberghe discussed if the attacks coming from Israel fell under the evaluation of self-defence and whether Gaza should still be considered an occupied territory. Marc Schack discussed whether Israeli attacks had breached the principle of proportionality under international humanitarian law.[35] Further, it was also debated whether the

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[32] Asem Khalil, 'Palestinian Refugees in Arab States: A Rights-Based Approach' (CARIM Research Reports, 2009), 1-2.

[33] UNGA194 (III) Palestine - Progress Report of the United Nations 11 December 1948, "Publication date 2009/12/14 Journal Robert Schuman Centre for Advanced Studies CARIM Research Report" <https://www.refworld.org/docid/4fe2e5672.html> accessed 15 November 2023.

[34] Jérôme de Hemptinne, 'Classifying the Gaza Conflict Under International Humanitarian Law, a Complicated Matter' (*EJIL: Talk! Blog of the European Journal of International Law*, 13 November 2023) <https://www.ejiltalk.org/classifying-the-gaza-conflict-under-international-humanitarian-law-a-complicated-matter/> accessed 11 January 2023.

[35] Marc Schack, 'In Defence of Preliminary Assessments: Proportionality and the 31

attacks coming from Israel fell under the self-defence argument and, in such a scenario then, if Gaza should still be considered an occupied territory.[36] In any case, Marco Sassòli articulated the answer to the above-given questions eloquently in the following:

> In my view, in particular, if the Gaza Strip is, as Israel argues, no longer occupied, the "order" by Israel to one million inhabitants of the Northern Gaza Strip to move away from their homes cannot possibly constitute a warning required (unless circumstances do not permit) by IHL, because such warning must concern an attack directed at a determined military objective and the entire northern Gaza Strip cannot possibly constitute a military objective. None of those violations by one side can justify those committed by the other.[37]

Amidst scholarly debates, at the end of December 2023, South Africa accused Israel of violating the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). It applied to the International Court of Justice (ICJ/the Court). South Africa asked the ICJ to order provisional measures to suspend its military operations in and against Gaza. The ICJ, on 26 January 2024, decided that Israel must, in pursuance of its obligations under the Genocide Convention, take all measures within its power to prevent killing members of the group, causing serious bodily or mental harm to members of the group; physical destruction of the group in whole or in part; and any measures intending to prevent births within the group.[38] The situation in Gaza after the

October Attack on the Jabalia Refugee Camp' (*EJIL: Talk! Blog of the European Journal of International Law*, 8 November 2023) <https://www.ejiltalk.org/in-defence-of-preliminary-assessments-proportionality-and-the-31-october-attack-on-the-jabalia-refugee-camp/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 5 December 2024.

36 Raphael Van Steenberghe, 'A plea for a right of Israel to self-defence in order to restrict its military operations in Gaza: when jus ad bellum comes to the aid of jus in bello' (*EJIL: Talk! Blog of the European Journal of International Law*, 16 November 2023) <https://www.ejiltalk.org/a-plea-for-a-right-of-israel-to-self-defence-in-order-to-restrict-its-military-operations-in-gaza-when-jus-ad-bellum-comes-to-the-aid-of-jus-in-bello/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 28 November 2023.

37 IHL in the paragraph stands as International Humanitarian Law. Marco Sassòli, 'Israel – Hamas 2023 Symposium – Assessing The Conduct of Hostilities in Gaza – Difficulties and Possible Solutions' (*Lieber Institute West Point*, 30 October 2023) <https://lieber.westpoint.edu/assessing-conduct-hostilities-gaza-difficulties-possible-solutions/> accessed 28 November 2023.

38 International Court of Justice, 'Application of the Convention on the Prevention

provisional measure decision of the ICJ deteriorated, and South Africa issued another provision measure, which was ordered on 28 March by the ICJ. The Court, in its provisional measure decision, not only stressed the vital importance of essential services and humanitarian assistance for Palestinians but also ordered: *"with immediate effect that [Israel's] military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the [Genocide Convention]."*[39] It is essential to add that not only the ICJ but also the International Criminal Court (ICC) has been investigating the war crimes that Israel has committed. On March 3, 2021, the Prosecutor of the ICC announced the opening of the investigation into the situation in the State of Palestine.[40] War crimes here should be considered not only against civilians but also UNRWA staff, doctors, and journalists. Since the start of the latest bombardment of Israel on October 2023, many journalists have been killed, including independent videographer journalist working for Agence France Presse (AFP) Moustafa Thuraya and Al Jazeera journalist Hamza Waël Dahdouh. Reporters Without Borders (RSF) filed complaints with the ICC, and the office of prosecutor Karim Khan assured the organisation that crimes against journalists are included in its investigation into Palestine.[41]

As is seen, the legal battlefield in the international arena continues to end Israeli crimes amounting to genocide. In between dialogues and the international courts' interference, there is only one Agency that has continued to support Palestinians not only since October 2023 but also before that date -throughout Palestine's ongoing agony-. On 8 December 1949, in response to Palestinians' continuing battle over Palestinian territories and their statelessness, the United Nations (UN) created the United Nations Relief and Works Agency for Palestine Refugees (UNRWA). The UNRWA was established after World War II, like another agency, the United Nations High Commissioner for Refugees (UNHCR). To be precise, UNRWA was born after the Arab – Israeli war of 1948. Its mandate was designated by the General Assembly of the United Nations (UNGA) Resolution 302(IV) of 8 December 1949. According to this resolution, UNRWA has a mission

and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)' 26 January 2024 <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-sum-01-00-en.pdf> accessed 7 May 2024.

39 International Court of Justice, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)' 28 March 2024 <https://www.icj-cij.org/node/203847> accessed 8 May 2024.

40 International Criminal Court, 'State of Palestine Situation in the State of Palestine ICC-01/18' <https://www.icc-cpi.int/palestine> accessed 8 May 2024.

41 Reliefweb, 'RSF secures inclusion of crimes against journalists in ICC investigation into Palestine' 10 January 2024 <https://reliefweb.int/report/occupied-palestinian-territory/rsf-secures-inclusion-crimes-against-journalists-icc-investigation-palestine> accessed 8 May 2024.

to carry out direct relief and works programmes and *"consult with interested Near Eastern governments concerning measures to be taken in preparation for the cessation of international assistance for relief and works projects"*.[42] It was decided that if Palestinian refugees received aid from UNRWA, they would be excluded from the protection of the Convention Relating to the Status of Refugees (1951 Refugee Convention).[43] We understand this exclusion from the language of Article 1D of the 1951 Refugee Convention.[44]

To clarify, Article 1 of the 1951 Refugee Convention first defines the refugee as a term of art, and under the same provision -1D-, it sets forth the *"exclusion clause"*. The 1951 Refugee Convention explains the status of a refugee under Article 1A as follows:

> ...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The 1951 Refugee Convention further stresses the conditions in the provision of 1D, which would exempt persons from the Convention's protection realm if they *"are at present receiving [protection] from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance"*.[45] As was mentioned in the introduction of this article, UNRWA's areas of operation are limited to Jordan, Lebanon, Syria, the West Bank (including Jerusalem East), and Gaza. Therefore, the very existence of UNRWA serves the purpose of maintaining the following aspects:

> [C]ontinuity of protection and assistance for Palestinian refugees whose refugee character has already been established and recognized

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42 Bocco (n 6) 231.

43 1951 Refugee Convention (n 22) art 1D.

44 Article 1D of the 1951 states the following:
This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

45 ibid article 1D.

> by various United Nations General Assembly resolutions in circumstances where that protection or assistance has ceased in accordance with the "inclusion clause" contained in the second paragraph of Article 1D.[46]

Statute of the Office of the UNHCR article 7(c), in a similar fashion, sets forth the following: *"Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person [w]ho continues to receive from other organs or agencies of the United Nations protection or assistance"*.[47] The regulations were designed to avoid a competence overlap between UNRWA and UNHCR.[48]

As mentioned earlier, the purpose of the provisions is to secure the ones whom UNWRA protects. Palestinians who benefit from this protection and meet the conditions to be refugees cannot access protection stemming from refugee status under the 1951 Refugee Convention article 1A. This concern has been a subject of debate in the doctrine because it has been contested that UNRWA's existence possibly creates a loophole for Palestinians' protection.[49] We can explain this point of view by focusing on Siraj Sait's argument.

Siraj Sait explains that Palestinians have been skilfully kept out of the 1951 Refugee Convention's domain.[50] In time, with the effect of the 9/11 attacks, the whole perspective regarding the Palestinian cause has shifted. To be more

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46 UN High Commissioner for Refugees (UNHCR), 'Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection', May 2013 <https://www.refworld.org/policy/legalguidance/unhcr/2013/en/41179> accessed 7 May 2024. Further see Bríd Ní Ghráinne, 'Article 1D of the 1951 Refugee Convention and Internally Displaced Persons', Internally Displaced Persons and International Refugee Law (Oxford, 2022; online edn, Oxford Academic, 17 Nov. 2022) <https://doi.org/10.1093/oso/9780198868446.003.0006> accessed 7 May 2024.

47 Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), UNGA res 428 (V), 14 December 1950, annex, art 7(c).

48 Brenda Goddard, 'UNHCR and the International Protection of Palestinian Refugees' (2009) 28 Refugee Survey Quarterly 2-3, 475-510.

49 Sibel Safi, 'Mülteci Hukukunda Uluslararası Koruma Dışında Bırakma ve Çocuk Askerlerin Durumu' (2020) 28 Selçuk Law Review 1, 5. Regarding the relevant discussions on the exclusion clause of the 1951 Refugee Convention and the components of refugee status, see Sibel Safi, *Mülteci Hukuku* (Legal Yayıncılık, 2. Baskı, 2023). Further see Tevfik Odman, *Tarihsel Gelişim Sürecinde Güncelleştirilmiş Mülteci Hukuku (Dünya'da ve Türkiye'de* İlticanın *Gelişim Süreci)* (Yetkin Yayınları, 2020), 53-55.

50 Siraj Sait, 'International Refugee Law: Excluding the Palestinians' in John Strawson (ed) *Law after Ground Zero* (Routledge, 2017), 90.

precise, today, secular communities in Western liberal democracies find the Holocaust still fresh for them; Palestinian militancy, therefore, sits at the other end of the spectrum of the victim/perpetrator paradox—Palestinian militancy in the eyes of the Western powers resembles Islamist terrorism in association with 9/11.[51] Apart from the terrorism-related hesitancies, the emergence of the 1951 Refugee Convention and the removal of Palestinians from the Convention's protection scope, international law created a 'protection gap'[52] and marginalised Palestinians through a *"combination of myths, conditionalities and strategies"*.[53] As Sait expands his evaluation, UNRWA's definition stands as an "operational definition" enabling Palestinians to access its services. Besides, the 1951 Refugee Convention does not contain any provision regarding refugees' right to return. The reason for Sait's approach lies in the UNRWA's definition of Palestinian refugee: *"persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict."* This definition leaves us with the question what happens to those who did not register with UNRWA or the ones who lost their registration as a result of changed status?[54] That being said, the Refugee Convention singled out Palestinians from its protection realm. This way, Palestinians are isolated in a system where their only haven has always been and will stay as UNRWA.

On the other hand, the 1951 Refugee Convention Article 1D brings about another exception to its established exemption by stating that when such protection or assistance being received from another agency *"has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."*[55] As clarified in the following paragraphs, this article analyses this exceptional situation when and if UNRWA's protection has ceased to exist for asylum applicants, for instance, from the Gaza Strip, in this particular scenario.

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51 Omar Shahabudin McDoom, 'How Unique is the Israel-Palestine Conflict?' (*LSE Middle East Centre Blog*, 11 August 2023) <https://eprints.lse.ac.uk/120973/1/mec_2023_11_8_how_unique_is_the_israel_palestine_conflict.pdf> accessed January 11, 2024.

52 See Michael Kagan, 'Is There Really a Protection Gap? UNRWA's Role Vis-À-Vis Palestinian' (2009) 28 Refugee Survey Quarterly 2-3, 511-530; Damian Lilly, 'UNRWA's Protection Mandate: Closing the 'Protection Gap' (2018) 30 International Journal of Refugee Law 3, 444–473; Susan M Akram, 'Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Convention' (2015) <https://scholarship.law.bu.edu/books/19> accessed 10 May 2024.

53 Sait (n 50) 91.

54 Sait (n 50) 97.

55 1951 Refugee Convention (n 22) art 1D.

2. The Opinion of Advocate General Emiliou for C-563/22 of the European Court of Justice

In this case, persons subject to the events, SN and LN, were stateless persons of Palestinian origin. They used to live in the Gaza Strip and were registered with UNRWA. After leaving the Gaza Strip in 2018, they stayed in Egypt and Türkiye for seven months. Later, they were transited through Greece undocumented and entered Bulgarian territory with KN, SN's husband and LN's father. At first, they sought asylum in Bulgaria, and for the second time, their applications for international protection were rejected by the Bulgarian authorities. By decision of 5 July 2019, the State Agency for Refugees, Bulgaria (the DAB) rejected SN and LN's applications for international protection by stating that SN and LN had not faced a real risk of persecution, including torture, inhuman or degrading treatment, death penalty, execution, or other serious threats. They also were not at risk of facing life-threatening hazards if they were to return to the Gaza Strip. Finally, the Chairperson of the DAB stated that SN and LN could have stayed in Egypt or Türkiye and that they had come to Bulgaria only to benefit from better economic conditions.[56]

On 21 August 2020, SN and LN again applied for international protection at the DAB Interviewing Body. SN and LN submitted evidence proving that they were registered with UNRWA. They argued that they must be granted refugee status in application of the *lex specialis* according to article 12(1)(a) of Directive 2011/95/EU.[57] Under that provision, they were *ipso facto* entitled to refugee status because UNRWA's protection or assistance concerning them had to be regarded as having 'ceased'.[58] Article 40(1) of Directive [2013/32]] regulates *"the safety of the applicant in his or her country of origin"*, and Article 12(1)(a) of Directive 2011/95 clarifies exclusion from refugee status. In practice, the mentioned exclusion clause applies only to stateless persons of Palestinian origin who have availed themselves of the protection or assistance of UNRWA.[59] Thus, to be considered deserving of the protection, one must not receive protection from the UNRWA, as mentioned earlier.

SN claimed that the situation in the Gaza Strip had been highly challenging regarding job opportunities, for instance. The unemployment ratio was high, the curfew had been on the scene, and schools were closed. SN also explained that her family home was destroyed by missiles on account, which left them with no choice but to relocate for two years.[60] As a side note, the report of the Special Rapporteur on the situation of human rights in the Palestinian territories

[56] Advocate General's Opinion in Case C-563/22 (n 16) para 20.

[57] Advocate General's Opinion in Case C-563/22 (n 16) para 2.

[58] Advocate General's Opinion in Case C-563/22 (n 16) para 22.

[59] Advocate General's Opinion in Case C-563/22 (n 16) para 37.

[60] Advocate General's Opinion in Case C-563/22 (n 16) para 24, 25.

occupied since 1967 also mentions the same issues described by SN. The Special Rapporteur's report carries importance in confirming on the UN level that Palestinian people have suffered from several problems, including collective punishment of Palestinian people, the continued expansion of Israeli settlements, the increase in settlers' violence, the detention of Palestinians, the use of settlement products; Israel's planned annexation of parts of the Palestinian West Bank; the situation of Human Rights Defenders and the impact of the COVID-19 pandemic.[61] The same report in paragraph 19 emphasises that Israeli occupation has for decades continued to impose conditions on the ground that entail serious human rights violations against Palestinians. The planned annexation by Israel will continue to affect millions of Palestinians living in the occupied West Bank and the Jordan Valley. Hundreds of thousands of Palestinians will face forcible displacement, leading to the statelessness of many. The special rapporteur describes the outcome of such an annexation as entrenching a two-tier system that puts people in a disadvantaged situation. Cogitating in the Jordan Valley, for example, Palestinian people already had suffered discrimination and neglect.[62]

By decision of 14 May 2021, the Deputy Chairperson of the DAB rejected SN and LN's subsequent applications, considering the existence of new elements and evaluating the relevance of those elements to their situation.[63] Adding to this, the Deputy Chairperson of the DAB did not see that the applicants directly experienced a personal threat that would amount to persecution, which stands as a must to apply for international protection. The Deputy Chairperson of the DAB further stated that SN and LN had benefited from UNRWA's protection, but they decided to leave it behind voluntarily. In the meantime, the Deputy Chairperson of the DAB did not foresee that, in a scenario, once SN and LN return to the Gaza Strip, they would not benefit from UNRWA's protection or assistance.[64] SN and LN challenged that decision before the Administrative Court, Sofia, by bringing out the non-refoulement principle.[65]

The Administrative Court, Sofia, pointed to the European Parliament resolution of 19 April 2018 on the situation in the Gaza Strip and the UNHCR Position on Returns to Gaza of March 2022. Both documents state *"serious allegations of infringements of international human rights law and of ongoing instability".*[66]

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61 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 'Situation of human rights in the Occupied Palestinian Territory, including East Jerusalem, with a focus on collective punishment' (A/HRC/44/60, 15 June – 3 July 2020).

62 ibid para 19.

63 Advocate General's Opinion in Case C-563/22 (n 16) para 26.

64 Advocate General's Opinion in Case C-563/22 (n 16) para 27.

65 Advocate General's Opinion in Case C-563/22 (n 16) para 28.

66 Advocate General's Opinion in Case C-563/22 (n 16) para

The Administrative Court, Sofia, further merged its enquiry by taking into account the undignified living conditions in Gaza and the non-refoulement principle and referred the case to the CJEU for it to resolve whether SN and LN would find themselves in extreme material poverty if they were forced to return to the Gaza Strip.[67] The Administrative Court, Sofia, also added another layer to its enquiry by asking *"whether UNRWA's protection or assistance must be regarded as having 'ceased', within the meaning of Article 12(1)(a) of Directive 2011/95".*[68]

Indeed, the situation in Gaza has changed since the first application of SN and LN for international protection. The conflict in the Gaza Strip has reached a point where no one should be asked to submit evidence about their circumstances in the face of ongoing conflict, where inhumane living conditions are reaching the limits of persecution.[69] Besides dire circumstances in the Gaza Strip, first, we need to understand that irrespective of the situation and the level of persecution, states are under the obligation of non-refoulement once they encounter an asylum claim. International legal regulations and relevant court decisions also tell us that *"people at a border crossing seeking protection must be allowed to enter to have their needs assessed"*.[70] The non-refoulement principle sets forth the best possible option for people needing protection: not overturning their demand to be accepted as refugees into the state's territories being on the receiving end.[71] Depriving them of the opportunity to seek asylum is contrary to the existence of the international refugee law regime. The UNHCR Executive Committee conclusions[72] and the *N.D. and N.T. v. Spain*[73] judgement

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67 Advocate General's Opinion in Case C-563/22 (n 16) para 32

68 Advocate General's Opinion in Case C-563/22 (n 16) para 30.

69 The Advocate General, in his opinion, also states that
> for people living in the Gaza Strip, where the level of insecurity and the living conditions have been changing rapidly, especially since the events that have taken place there since 7 October 2023, precise and up-to-date information as to the general situation currently prevailing in that area must be taken into account, in addition to the reasons that led such persons to leave it in the first place. Advocate General's Opinion in Case C-563/22 (n 32) para 64.

70 Jane McAdam and Guy S Goodwin-Gill, 'Israel – Hamas 2023 Symposium – Refugee Law' (*Lieber Institute Articles of War,* 17 November 2023) <https://lieber.westpoint.edu/refugee-law/?mc_cid=78a574bca5&mc_eid=0cd57908d5> accessed December 25, 2023.

71 Nell Gabiam, 'Palestinians and Europe's 'Refugee Crisis' Seeking Asylum in France in the Wake of the Syrian War' (2022) 34 Journal of Refugee Studies 2, 1329.

72 UNHCR Executive Committee Meetings, 'Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) – 1981, Executive Committee of the High Commissioner's Programme' <https://www.unhcr.org/au/publications/protection-asylum-seekers-situations-large-scale-influx> accessed 13 December 2023.

73 *ND and NT v Spain*, App Nos 8675/15 and 8697/15 (13 February 2020, ECtHR).

of the European Court of Human Rights (ECtHR) are the straightforward legal extensions of this deduction.

UNRWA's protection and whether it has ceased to exist for an individual in case of an application for refugee status ultimately must be linked with the concern about the dignified living conditions in the Gaza Strip without considering the applicant's circumstances. Palestinian people must rely on international humanitarian aid for survival because of the complete siege in Palestine. Considering extreme economic sanctions and embargoes, i.e., on Iraq, Iran, and Cuba, we should understand that sieges and economic warfare contribute to *"the destruction of infrastructure and the impoverishment of the affected population"*.[74] In Palestinian territories, especially in Gaza, the population has been trapped in an area that hinders their ability to live a complete life.

Refugees are human beings. Thus, the logic is simple. Humans flourish under conditions where they can experience themselves as effective social agents. As agents, they should be allowed to make choices; they need to plan their futures. In that way, they seek ways to shape their social environment sporadically and organically.[75] Full support to an individual and a group at large happens through the following means: access to housing, health, welfare systems, education, training, employment, and political membership. Thus, considering the Palestinian stateless refugees in the Gaza Strip, they have no means to maintain a dignified living, which can be clarified further concerning the difficulties UNRWA has been facing in terms of protection of both civilians and its staff and receiving financial aid from donor states.

As the Advocate General refers in para 39 about Advocate General Sharpston's Opinion in the Bolbol case, after the Israeli–Arab conflict of 1948, intending to, among other things, prevent a mass exodus from the geographical area which used to be Palestine *"continued to receive effective protection or assistance until their position had been definitively settled following the relevant resolutions of the General Assembly of the United Nations"*.[76] Thus, UNRWA's effective existence is essential. Advocate General in para 62 elaborates that the cessation of UNRWA's protection or assistance happens first if the Agency ceases to exist. Second, the person concerned finds themselves in a position to leave unconnected with their will in that direction. For example, the UNRWA should be able to guarantee that people will have dignified living conditions under its mandate, which will also prevent forcible movement. As Advocate General states in para 75, the exclusion clause designed to include Palestinian refugees *"can no*

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74 Theresa Farhat and et al, 'Responding to the Humanitarian Crisis in Gaza: Damned if You do… Damned if You don't!' (2023) 89 Ann Glob Health 1.

75 Aleinikoff and Owen (n 21) 468.

76 Advocate General's Opinion in Case C-563/22 (n 16) para 39.

longer be justified if UNRWA's failure to ensure the satisfaction of those basic needs results in them being exposed to treatment incompatible with Article 4 of the Charter".[77]

In the Gaza Strip, where UNRWA operates, as the Advocate General expresses in his opinion in para 81, people experience systemic deficiencies *"because of an armed conflict or a military blockade or, to use the terms of the referring court, an 'unprecedented humanitarian crisis'"*.[78] Thus, anyone in the Gaza Strip faces extreme material poverty that does not allow them to meet their most basic needs -food, personal hygiene, and a roof that will be a shelter for them.[79] Therefore, as the Advocate General concludes, there is no need to prove that living conditions in Gaza are undignified. However, in para 38, the Advocate General highlights that if UNRWA's protection or assistance can be considered to have 'ceased', refugee status is not automatically granted. The national authorities must still verify that the persons concerned do not fall within the scope of any of the grounds for exclusion. The Advocate General states that the 1951 Refugee Convention and 1967 Protocol require a person to be considered a refugee to have already been displaced from their country. In each scenario, displacement must occur because of a well-founded fear of persecution due to race, religion, nationality, membership in a particular social group, or political opinion.

Suppose in the scenario we accept that a country considers UNRWA's protection mission to have ceased once it takes up an asylum claim submitted by a Palestinian stateless refugee whose status has been first identified by UNRWA. This result brings us to this Article's final question. Then, in real-life circumstances, can Palestinians seek protection elsewhere? We should consider two possibilities to answer the problem in the previous sentence.

First, upon the acceptance of the UNRWA's protection deficiency for the applicant by the receiving state, in an ideal world, the applicant should be able to receive refugee status from the state in question and enjoy the benefits of being a refugee. However, initially, to reach a destination state, Palestinians should be able to leave the Gaza Strip. Suppose Palestinians can escape from Gaza through one of the seven passages. In that case, they may encounter further hectic issues, including the likelihood of evacuation of Palestinians from Palestinian territory, where they may never go back.[80]

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77 Advocate General's Opinion in Case C-563/22 (n 16) para 75.

78 Advocate General's Opinion in Case C-563/22 (n 16) para 81.

79 Advocate General's Opinion in Case C-563/22 (n 16) para 81.

80 Kelsey P Norman and Nicholas R Micinski, 'Why Won't Egypt Accept Palestinians?' (*Inkstick*, 20 October 2023) <https://inkstickmedia.com/why-wont-egypt-accept-palestinians/> accessed 6 December 2023.

Second, the issue arises for states where stateless Palestinians are already under their jurisdiction. Considering the European Union countries' asylum policies, Palestinians would face particular difficulties in obtaining refugee status, even if these states opt the UNRWA out of the equation. The mentioned difficulties stem from already existing racial borders, Islamophobia and terrorism-related fears that have been on the rise after the 9/11 attacks. Thomas Gammeltoft-Hansen establishes that in the face of politicised asylum practices, many countries have adopted procedural and physical deterrence mechanisms to prevent refugees from accessing protection.[81] On the other hand, geographically speaking, if Palestinians seek protection - from Arab nations, they may face harsh border measures and experience difficulties in integration into the Arab states.

The two aspects of Palestinians' protection matter by a state and their departure from oPt and states' legal responsibilities for collaboration and protection of refugees under international law are analysed in the following two parts of this Article.

3. Possibilities of Seeking Protection Elsewhere for Palestinians

One may ask to what extent a non-refugee person may easily assume the needs of a refugee. After all, *"what is needed for refugees is probably best construed as rapid resettlement and political membership of a new state."*[82] UNGA, in its resolution, established the fundamentals of refugee protection as in the following:

> [I]nternational protection of refugees is a dynamic and action-oriented function that is at the core of the mandate of the Office of the High Commissioner and that it includes, in cooperation with States and other partners, the promotion and facilitation of, among other things, the admission, reception and treatment of refugees in accordance with internationally agreed standards and the ensuring of durable, protection-oriented solutions, bearing in mind the particular needs of vulnerable groups and paying special attention to those with specific needs, and notes in this context that the delivery of international protection is a staff-intensive service that requires adequate staff with the appropriate expertise, especially at the field level.[83]

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81 Thomas Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27 Journal of Refugee Studies 4, 574-595.

82 Aleinikoff and Owen (n 21) 470.

83 Office of the United Nations High Commissioner for Refugees. Resolution adopted by the General Assembly on 24 January 2008 [on the report of the Third Committee (A/62/431)], para 14.

In implementing the UNGA's approach, as Galagher outlines, there are three main ways to protect refugees. The first stands with links to the first country of asylum where refugees can be locally integrated. The second option is repatriation to the country of origin. The third is resettlement; a safe third-country alternative must be considered.[84] Drawing from such an assessment of Galagher, Palestinians' protection requires both long-term and short-term solutions that will direct us to immediate relief and assistance for people in dire, life-threatening circumstances. Safe zones, for instance, might provide immediate relief for Palestinians' protection at times of armed conflict. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) states that the safe zones are established "*if the need arises, in occupied areas, … to protect from the effects of war…*".[85] Safe zones serve two purposes in opposite directions: "*to prevent the refugees crossing the border by providing a safe space within their countries of origin, and to facilitate the return of refugees who have already crossed the border"*.[86] Thus, the safe area is *"a confined geographical space within a conflict zone in which at least one external actor or all belligerent parties effectively guarantee protection for civilians from a threat of conflict-related physical violence"*.[87] Having this legal aspect can make us realise that, in practice, it is almost impossible to maintain a safe zone area for Palestinians. It was reported that Israel designated Gaza's main north-south route – Salah al-Din Street – as a safe corridor. Yet since then, in Gaza's main road artery, *"Palestinians have been randomly bombed, executed, forcibly disappeared, tortured and humiliated"*.[88]

Maintaining safe zones would be more viable for Palestinian refugees. On the other hand, retrieving safe routes is another solution for accessing immediate relief that can open the door to long-term solutions. After all, Aleinikoff and Owen assume that *"what is needed for asylum refugees is probably best construed as*

[84] Dennis Galagher, 'Durable Solutions in a New Political Era' (1994) 47 Journal of International Affairs 2, 429-450.

[85] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

[86] Birce Demiryontar and Ahmet İçduygu, 'The politics around safe zones: a comparative perspective on return to Northern Syria' (2023) 44 Third World Quarterly 8, 1754-1769.

[87] Robin Hering, 'Safe areas for the protection of civilians. An overview of existing research and scholarship' (2020) 9 Z Friedens und Konflforsch, 283- 303.

[88] Nicola Perugini, 'Safe zones: Israel's technologies of genocide' (*Al Jazeera*, 6 January 2024) <https://www.aljazeera.com/opinions/2024/1/6/safe-zones-israels-technologies-of-genocide> accessed 23 January 2023.

rapid resettlement and political membership of a new state."[89] However, safe routes can only happen if bordering countries lift entry restrictions for individuals fleeing the conflict and ensure access to protection. Allowing safe passage between nations opens doors for humane asylum. Humane asylum primarily includes medical evacuation, family reunions, and refugee protection visas.[90]

In consideration of the neighbouring states,[91] as Oroub El-Abed comments in an article published in 2009, Palestinians in Egypt were unprotected under international law and Arab League protocols. As he explains, issues related to Palestinians should be resolved per UN General Assembly Resolution 194(III), which formulates possible solutions based on repatriation or compensation rather than settling Palestinians in Arab nations. Arab Nations supported this idea because of their firm belief that the issues Palestinians and neighbouring states were facing occurred as a result of Western States' support of Israel. Thus, it should be the Western States that need to pursue options for Palestinians' protection.[92]

Indeed, it seems that Arab nations' approaches have not changed. For example, Sameh Shoukry commented in 2023 about the conflict in the Gaza Strip by stating, *"I see no reason why Egypt, which is hosting 9 million refugees — hosting them and providing their integration into our society at considerable burden on our economy — should have to bear solely [the] additional influx of Gazans"*.[93] Egypt has not been willing to open its borders to Palestinian refugees and has

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89 Aleinikoff and Owen (n 21) 470.
UN General Assembly Resolution 302, in paragraph 5, states the following: Recognises that, without prejudice to the provisions of paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948, continued assistance for the relief of the Palestine refugees is necessary to prevent conditions of starvation and distress among them and to further conditions of peace and stability, and that constructive measures should be undertaken at an early date with a view to the termination of international assistance for relief. UN General Assembly, 'General Assembly Resolution 302 Assistance to Palestine Refugees A/RES/302 (IV)' 8 December 1949, para 5 <https://www.unrwa.org/content/general-assembly-resolution-302> accessed 23 January 2023.

90 OCHA Reliefweb, 'OCHA Reliefweb, Safe passage for people impacted by the violence in Israel and Palestine' (23 November 2023) <https://reliefweb.int/report/occupied-palestinian-territory/safe-passage-people-impacted-violence-israel-and-palestine> accessed November 25, 2023.

91 For a detailed analysis also see Jinan Bastaki, (2017) 8 'The Legacy of the 1951 Refugee Convention and Palestinian Refugees: Multiple Displacements, Multiple Exclusions', Berkeley J. of Middle Eastern & Islamic Law 1, 1-21.

92 Oroub El-Abed, 'The Palestinians in Egypt: Identity, Basic Rights and Host State Policies' (2009) 28 Refugee Survey Quarterly 2/3, 535.

93 Lee Ying Shan, 'Egypt does not see why country should 'bear solely' the responsibility for Gaza's refugee influx' (*CNBC,* 18 October 2023) <https://www.cnbc.com/2023/10/18/egypt-does-not-see-why-it-should-be-responsible-for-gazas-refugee-influx.html> accessed 13 December 2023.

not allowed the establishment of Palestinian refugee camps on its land. Egypt is a country neighbouring the Gaza Strip that is facing geopolitical and moral dilemmas,[94] but its stance does not seem promising.

On the other hand, according to the UNRWA, there are more than 2 million registered Palestine refugees in Jordan, and many of them have full citizenship. There are ten official and three unofficial camps. Other refugees live near the camps.[95] One study explains that, in Shiblak's view, in 1996, Jordan was the only country among many that had integrated Palestinians into Jordanian society. It happened because refugees were treated within the national legal framework regarding freedom of movement and the right to work.[96] Amidst the ongoing conflict, however, recently, Jordan's Prime Minister Bisher al Khasawaneh explained that peace with Israel remained a strategic choice. Any push to drive Palestinians to the Kingdom, he added, *"would pose an 'existentialist' threat"*, as Khasawaneh supports the idea of a two-state solution.[97]

Turning our attention to Lebanon, until 1958, Palestinian refugees' stay in the country was seen as temporary; thus, their presence was mainly welcomed by the Lebanese population. Following the Lebanese Turmoil of 1958, the Army's Intelligence Bureau and the police began to control the camps, causing restrictions for Palestinians in a variety of different aspects of their day-to-day lives.[98] As UNRWA reported, according to a 2017 headcount, nearly half of the Palestinian people lived in the country's 12 official Palestine refugee camps.[99] Further, according to the same UNRWA report, Palestine refugees in Lebanon

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94 Lorenzo Navone, 'Egypt's Rafah crossing is a lifeline to Palestinians living in Gaza – but opening it is still unresolved' (*The Conversation*, 16 October 2023) <https://theconversation.com/egypts-rafah-crossing-is-a-lifeline-to-palestinians-living-in-gaza-but-opening-it-is-still-unresolved-215718> accessed 28 November 2023.

95 United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), 'Where We Work' <https://www.unrwa.org/where-we-work/jordan> accessed December 13, 2023.

96 Changrok Soh, Yoonjeong You and Youngsoo Yu, 'Once Resolved, Stay Resolved? The Refuse Policy of Jordan toward Palestinian Refugees' (2016) 23 Journal of International and Area Studies 1, 1-16.

97 'Jordan's PM says peace with Israel remains strategic choice despite Gaza war' (*Reuters,* 16 January 2024) <https://www.reuters.com/world/middle-east/jordans-pm-says-peace-with-israel-remains-strategic-choice-despite-gaza-war-2024-01-16/> accessed January 23, 2023.

98 Perla Issa, 'Palestinian Refugees in Lebanon A Vulnerable Yet Vibrant Community' *The Interactive Encyclopedia of the Palestine Question* <https://www.palquest.org/en/highlight/6590/palestinian-refugees-lebanon> accessed 7 February 2024.

99 UNRWA, 'Protection brief Palestine refugees living in Lebanon' (September 2020) <https://www.unrwa.org/sites/default/files/20-09-28_lfo_context_protection_brief_2020_final83.pdf> accessed 7 February 2024.

could not access means to enjoy their fundamental human rights. Palestinians in Lebanon have been socially marginalised to the point that their ability to reach civil, social, political and economic rights, including the right to work and the right to own property, have been restricted.[100]

Along with Arab states, if we add European states to the equation, we also need to look at the approach of European states towards the Palestinian–Israeli conflict. Over the years, the international community has witnessed a divided Europe. On one hand, the EU supported the peace agreements. However, in the face of the second Intifada from 2000 to 2006, the 2006 war between Israel and Hezbollah, and Israel's occupation of Palestinian territories– the EU Member States have not made it obvious if they acknowledge the Palestinians' struggle under Israel's dominance.[101] If we make a reality check beyond European leaders' approach towards Palestinians, we first must reflect on European states' stance in migration-related matters in general. Since the beginning of the Syrian armed conflict, rising refugee movements over the Mediterranean Sea and continuing unsettled troubles arising not only in the Middle East but also in African states leading to persecution have paved the way for externalisation in asylum policies of the EU states. For example, the United Kingdom's refugee deal with Rwanda, Italy's conservative prime minister Giorgia Melony's strict asylum plans and Greece's persistent pushback practices have shown that Europe's key figures and states are willing to adopt any strategy that will have a deterrence effect over current and prospected refugees. For example, ideally, societies are expected to find ways to understand that the financial or life challenges experienced in a country are not related to refugees. However, in some European countries, politicians tend to point at refugees in the face of rising economic or social challenges. Political negativity here is filled chiefly through artificial narratives stemming from racial borders and xenophobia towards refugees. As a result, *"refugees often encounter racialised migration controls and systems which privilege some refugees over others".*[102] Some European governments plan to send asylum seekers outside Europe to have their claims processed.[103]

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100 ibid.

101 Maxime Lefebvre, 'The EU and the Israeli-Palestinian conflict: many voices, no shared vision' (*The Conversation*, 19 October 2023) <https://theconversation.com/the-eu-and-the-israeli-palestinian-conflict-many-voices-no-shared-vision-215940> accessed 23 January 2024.

102 Cathryn Costello and Michelle Foster, '(Some) refugees welcome: When is differentiating between refugees unlawful discrimination?' (2022) 22 International Journal of Discrimination and the Law 3, 244-280.

103 BBC, 'Which other countries send asylum seekers overseas?' (14 April 2022) < https://www.bbc.com/news/uk-61106231> accessed 7 February 2024.

In this scene, in which externalisation and deterrence are two key features dominating asylum policies of Europe, Palestinians may likely not find a haven in European states either.

But from a legal point of view, can states act on such discretion and turn their backs on one of the most vulnerable groups in the World?

4. States' legal responsibilities in protecting refugees and the clash between law and practice

The first step in protecting refugees requires states' collaboration and further safeguarding of refugees' rights in alignment with internationally agreed-upon standards. The question then becomes, what are the internationally agreed-upon standards that can guide states towards collaborating with other countries and implementing humane asylum procedures?

The New York Declaration on Refugees and Migrants (New York Declaration) was adopted by the UN General Assembly in 2016. The purpose of adopting such a declaration was to improve *"the way the international community responds to large movements of refugees and migrants."*[104] As emphasised in the Declaration, the said response can be achieved by providing humanitarian aid, making the necessary legal regulations, and developing and strengthening legal regimes to protect immigrants and refugees. The New York Declaration led to the emergence and adoption of the Global Compact on Refugees (GCR).[105] The Global Compact on Refugees is a text that emerged with the idea of determining the need to protect refugees and producing solutions due to the gaps and deficiencies in legal regulations and implementation (perennial gap). These difficulties can be overcome not by establishing more legal rules but by a more robust, comprehensive and well-intentioned application of current laws

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[104] UNHCR New York Declaration for Refugees and Migrants Answers to Frequently Asked <https://globalcompactrefugees.org/sites/default/files/2019-12/New%20York%20Declaration-%20Frequently%20Asked%20Questions%20%282017%29.pdf> accessed 10 June 2021."plainCitation":"UNHCR, 'The New York Declaration for Refugees and Migrants Answers to Frequently Asked Questions' <https://globalcompactrefugees.org/sites/default/files/2019-12/New%20York%20Declaration-%20Frequently%20Asked%20Questions%20%282017%29.pdf> accessed 10 June 2021.","noteIndex":517},"citationItems":[{"id":338,"uris":["http://zotero.org/users/7868120/items/CXJWFNSG"],"itemData":{"id":338,"type":"document","publisher":"UNHCR","title":"The New York Declaration for Refugees and Migrants Answers to Frequently Asked Questions","URL":"https://globalcompactrefugees.org/sites/default/files/2019-12/New%20York%20Declaration-%20Frequently%20Asked%20Questions%20%282017%29.pdf","author":[{"literal":"UNHCR"}],"accessed":{"date-parts":[["2021",6,10]]}}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

[105] Office of the United Nations High Commissioner for Refugees, The Global Compact on Refugees (17 December 2018, A/RES/73/151).

and principles.[106] GCR addresses a long-standing gap in ensuring burden and responsibility sharing between states.[107] The mentioned gap refers to the equal distribution of responsibility in supporting refugees and providing the necessary means for running their asylum procedures.

Similarly, the 1951 Geneva Convention mentions the need to distribute equal responsibility among states. Recognising the right to asylum may impose a cumbersome burden on some countries, and the problem of equal distribution of responsibility can only be resolved satisfactorily with international cooperation.[108] In its 2005 final report, ExCom also underlined the importance of burden and responsibility sharing at all mentioned stages, including providing access to protection in addressing and facilitating durable solutions and responding to the needs of refugees.[109] It is vital to ensure a distribution of responsibilities to meet refugees' needs and respond to their asylum requests. However, the equal distribution in question causes a handicap. When discussing shared responsibilities, the language -distribution of the burdens that refugees bring- may create a negative perception towards them. A concept as a burden may lead to the misconception that refugees are commodities that can be distributed/ divided and, therefore, should not be perceived as people whose opinions and wishes should be considered.[110]

How can equally sharing the responsibility to protect refugees be realised?

We shall look at the legal framework mentioned above to answer this question. At first, GCR as an agreement has necessary regulations to guide states and can be effective if implemented. However, the problematic point regarding states is that they must integrate the relevant principles into their legal rules and enforce them fairly. However, the GCR is not binding, and like other UN documents of its kind, the language of the Compact is structured to be voluntary, prioritising state will. On the other hand, GCR has several practical components. First, GCR established the Global Refugee Forum (GRF), a high-level forum of UN member states and other stakeholders that will meet every four years, starting in 2019. Second, the GRF has envisioned a new mechanism through which host countries can request to activate support platforms to address their specific challenges.

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106 Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 European Journal of International Law 4, 967-995.

107 Volker Türk, 'The Promise and Potential of the Global Compact on Refugees' (2018) 30 International Journal of Refugee Law 4, 575-583.

108 1951 Refugee Convention (n 22) para 4.

109 Executive Committee of the High Commissioner's Programme, 'General Conclusion on International Protection No. 102 (LVI)' (2005) <https://www.refworld.org/docid/43575ce3e.html> accessed 15 March 2023.

110 See Marnie Jane Thomson, 'The Invisible Burdens of Burden-Sharing' (2022) 4 Front Hum Dyn.

As is seen, GCR cannot provide an ideal solution for unequal distribution among states in accepting refugees. Another reason for this, as mentioned above, is that not only is becoming a party to GCR and complying with the stated principles optional, but the scope of its principles needs to be sufficiently specified. Therefore, implementing the accepted principles depends on the goodwill of the stakeholders.[111] GCR offers only second-best solutions that hold some promise for encouraging various stakeholders to contribute monetarily or otherwise to the collective global effort to address the refugee problem.

GCR is a document that produces solutions. However, an approach based on the voluntary action of states and in which accepting refugees is tied to their economic potential is doomed to fail. GCR encourages governments to provide labour mobility opportunities for refugees, including identifying refugees in third countries with the skills needed. As a result, most refugees worldwide are forced to seek asylum in developing countries. The few wealthy states that accept large numbers of refugees, such as Canada, Sweden and Germany, are doing so on an increasingly selective basis, forcing refugees to seek dangerous and often fatal routes to safety.[112] When a state uses physical force against refugees who have reached its border, it also controls its fate. When evaluating the application of a foreigner in need of asylum, the state in question determines the survival chance of that refugee with a pen rather than a gun. As a result, the two are similar in terms of the impact they create.[113]

Besides GCR, the responsibility of states to protect people was also adopted unanimously by the head of states at the 2005 UN World Summit (General Assembly resolution 60/1 (2005)). The 2005 UN World Summit's goal was to create a baseline for the states for the prevention of genocide and mass atrocities and protection of potential victims. The mentioned goals are based on fundamental principles, such as the principle of responsibility to protect. Accordingly, the principle of responsibility to protect has three elements: First, states must protect their populations from the crimes of genocide, war crimes, ethnic cleansing, crimes against humanity and incitement of these crimes; second, the international community has a responsibility to help a state fulfil its

111 Katerina Linos and Elena Chachko, 'Refugee Responsibility Sharing or Responsibility Dumping?' 110 (2022) California Law Review, 907-909.

112 Lama Mourad and Kelsey P Norman, 'The World Is Turning Its Back on Refugees' (*The Atlantic*, 24 December 2019) <https://www.theatlantic.com/ideas/archive/2019/12/world-turning-its-back-refugees/604042/> accessed 24 March 2023.

113 Matthew J Gibney, 'Beyond the bounds of responsibility: western states and measures to prevent the arrival of refugees' (2005) 22 Global Migration Perspectives, 157 < https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/gmp/gmp22.pdf> accessed 7 February 2024.

responsibility to protect; third, where the state concerned has manifestly failed to protect its population against one or more international crimes, the international community has the responsibility to take timely and decisive action per the UN Charter.[114] The principle of responsibility to protect generally relates to protecting civilians, drawing on international humanitarian, human rights and refugee laws. The doctrine of the responsibility to protect is built on the logic of protecting populations from widespread and systematic mass atrocities. The focus of the responsibility to protect is on preventing mass atrocities before they happen. For this purpose, providing international assistance and aptitude building to states to strengthen their internal protection capacities is among the main objectives of the responsibility to protect doctrine. In other words, according to the responsibility to protect, sovereign states primarily protect their populations from mass atrocities. However, if they fail to do so through incompetence or bad faith, it becomes the international community's responsibility to take appropriate action. It may also be necessary to use force against the state concerned, but only in extreme and exceptional cases and with the approval of the Security Council.[115]

In refugee protection, the Rabat Declaration should also be considered. During the high-level part of the Third Global Consultation on the Health of Refugees and Migrants, held between 13 and 15 June 2023, Ministers and government representatives adopted the Rabat Declaration to strengthen the global commitment to improving the health of refugees and migrants. Government representatives from 48 United Nations Member States attended the event, jointly organised by the Kingdom of Morocco, the World Health Organization (WHO), the International Organisation for Migration (IOM), the UN Migration Agency, the UN Refugee Agency and the UNHCR.[116]

As is established in this part, states are obligated to protect refugees. Palestinians, as stateless refugees, should be able to demand a dignified living; they should be able to leave for another state if the support and protection they are required to maintain a dignified life has ceased to exist. International law rules and regulations on state responsibility to protect exist because anyone breathing

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114 Alex J Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24 Cambridge University Press Ethics & International Affairs 2, 143 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/BBD6415977D60D6030182D04EF84D821/S0892679400006845a.pdf/the-responsibility-to-protectfive-years-on.pdf> accessed 30 March 2023.

115 Naomi Kikoler, 'Responsibility to Protect' (Oxford University Refugee Studies Center, 2009), 3 <https://www.rsc.ox.ac.uk/publications/responsibility-to-protect> accessed 23 January 2023.

116 World Health Organization, 'Rabat Declaration Adopted to Improve Refugee and Migrant Health' (2023) <https://www.who.int/news/item/16-06-2023-rabat-declaration-adopted-to-improve-refugee-and-migrant-health?mc_cid=3547bdd524&mc_eid=0cd57908d5> accessed 19 June 2023.

in this World deserves protection. This means if one receives no protection from an already existing Agency, one must be able to get and receive that protection from somewhere else. Many states' asylum policies seem to disregard this basic understanding today.

Conclusion

The analysis of this article was designed to take a closer look at the October 2023 conflict and the consequences of the Israeli military operation on Gaza, resulting in questioning the protection capacity of the UNRWA. As the study reveals, such an enquiry requires a multi-faceted approach to understand the persecution that the Palestinians on the occupied territories and, in particular, the people of Gaza have been enduring. The analysis set forth that the October 2023 conflict stands as the continuation of an ongoing battle that Palestinians have been struggling with for decades. In their fight to raise their voices and claim their independence, Palestinians have been supported by the UNRWA as stateless refugees. The isolation of Palestinians by tying their protection with the UNRWA gave birth to another legal issue which plays around a scenario when and if the UNRWA loses its capacity to protect Palestinians. The 1951 Refugee Convention took the lead and stated that in such a scenario, Palestinians should seek protection elsewhere that would make them convention refugees eventually. Indeed, such concerns regarding Palestinians' status under international law, UNRWA's protection capacity, and the scope of the 1D of the 1951 Refugee Convention are not new. The goal of this article was to contribute to the scholarly analysis first by conveying that the UNRWA, as a result of Israeli persecution started on October 2023, has in many ways lost its capacity to protect Palestinians under its mandate. To prove the argument on whether UNRWA's protection capacity has ceased to exist, the article examined Advocate General Nicholas Emiliou's opinion. Second, in confirmation of the many scholars' view that still to this day, Palestinians are left alone and confined in Gaza and at the Rafah Border in the face of UNRWA's diminished protection mechanisms and amidst closed doors of states. Further, UNRWA's existence as a result of its weakened protection capacity causes deprivation for Palestinian refugees not only because they are left without support but also in terms of not being able to attain refugee status.

Under the light of current international legal regulations, it is clear that the international community, not only wealthy nations but also remaining countries at large, have a joint responsibility towards not only refugees but also Palestinians in particular. Mentioned responsibility takes its roots from the notion of protecting fellow humans against war crimes and unprecedented, indiscriminate bombings rained over civilians. According to the perspective put forward by Advocate General Nicholas Emiliou, when the possibility of a Palestinian stateless refugee seeking asylum from another state occurs, the state in question must provide

the appropriate protection following the above-mentioned international law regulations, acknowledging the fact that the applicant is no longer under the protection of UNRWA. However, primarily when the current immigration policies of Arab states and European countries are evaluated, in the mentioned scenario, there is still a strong possibility that a Palestinian seeking asylum will encounter obstacles even if the current situation in Gaza is known across nations. If states, in the face of the current legal framework, still decide to leave Palestinians to their fate, then the question remains unanswered: protection where?

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RECENT AMENDMENTS AND JUDICIAL REVIEW OF DECISIONS BY THE TURKISH DATA PROTECTION AUTHORITY*

Son Değişiklikler Işığında Kişisel Verileri Koruma Kurumu Kararlarının Yargısal Denetimi

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Abstract

The enactment of the Turkish Personal Data Protection Law ("PDPL") on 7 April 2016 marked a milestone, in line with the country's candidacy for EU membership. It established the Turkish Data Protection Authority (the "DPA"), an independent body that oversees compliance, research, and trends in personal data protection law. In cases of non-compliance, the DPA conducts thorough investigations resulting in a variety of decisions. The appeals process used to vary; fines were subject to the Misdemeanour Law and criminal courts, while other decisions were referred to administrative courts. Recent developments, in particular, a decision by the Constitutional Court, have further highlighted the inadequacy of the current system of judicial review. Following this decision, Turkish lawmakers introduced a Reform Law that brought several amendments to the PDPL. Administrative courts have been designated as the competent judicial organ with these changes. This study examines both the situation before and after the reform. While there is still room for improvement, the Reform Law has met an important need for legal certainty, security and having an effective judicial review system.

Keywords: personal data, Turkish DPA, Turkish DPA decisions, judicial review

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

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Özet

Kişisel Verilerin Korunması Kanunu'nun ('KVKK') 7 Nisan 2016 tarihinde yürürlüğe girmesi, Türkiye'nin AB üyeliği adaylığı doğrultusunda bir dönüm noktası olmuştur. Kanun, kişisel verilerin korunması hukukuna uyum, araştırma ve eğilimleri denetleyen bağımsız bir kurum olan Kişisel Verileri Koruma Kurumu'nu kurmuştur. Kanun hükümlerinin ihlal edilmesi durumlarında, Kişisel Verileri Koruma Kurumu kapsamlı soruşturmalar yürütmekte ve bu soruşturmalar çeşitli kararlarla sonuçlanmaktadır. Kurum tarafından verilen bu kararların temyiz süreci kısa bir süre öncesine kadar çeşitlilik göstermekteydi. Kurum tarafından verilen idari para cezaları Kabahatler Kanunu'na tabi ve sulh ceza hakimliklerinde görülmekte iken, diğer kararların itiraz süreci idare mahkemelerinde görülmekteydi. Bu hususta yakın zamanda Anayasa Mahkemesi tarafından verilen bir karar, mevcut yargısal denetim sisteminin yetersizliğini daha da vurgulamıştır. Bu kararın ardından, KVKK'da çeşitli değişiklikler öngören Reform Kanunu 12 Mart 2024'te yürürlüğe girmiştir. Bu değişikliklerle idare mahkemeleri Kurum tarafından verilen kararlara karşı itiraz hususunda yetkili yargı organı olarak belirlenmiştir. Bu çalışmada hem Reform öncesi hem de Reform sonrası durum incelenmiştir. Reform kanununda halen iyileştirmeye açık alanlar bulunmakla birlikte, bu değişiklik hukuki güvenlik ve belirlilik yanı sıra etkili bir yargı denetimine haiz olmak açısından önemli bir ihtiyacı karşılamıştır.

Anahtar Sözcükler: kişisel veri, Kişisel Verileri Koruma Kurumu, Kişisel Verileri Koruma Kurumu kararları, yargı denetimi

INTRODUCTION

The primary motivations behind formulating a legal framework for the protection of personal data in Türkiye can be attributed to three key factors: the effective safeguarding of human rights, the ongoing membership negotiations with the European Union and the need to enhance international cooperation and trade.[1] To achieve these aims, the Law on Personal Data Protection (the "PDPL"), numbered 6698 was adopted and published in the Official Gazette of Türkiye.[2] Article 1 of the PDPL states that the purpose of the law is to protect the fundamental rights and freedoms of individuals with regard to the processing of personal data and to regulate the obligations of natural and legal persons who process personal data, as well as the procedures and principles to be followed.

1 *Kişisel Verilerin Korunması Kanununa İlişkin Uygulama Rehberi* (KVKK Yayınları 2018) 9 <https://kvkk.gov.tr/SharedFolderServer/CMSFiles/0517c528-a43d-49f5-b1eb-33dc-666cb938.pdf> accessed 18 April 2024; 'Kişisel Verilerin Korunması Kanunu ve Uygulaması' 9 <https://kvkk.gov.tr/yayinlar/K%C4%B0%C5%9E%C4%B0SEL%20VER%C4%B0LER%C4%B0N%20KORUNMASI%20KANUNU%20VE%20UYGULAMASI.pdf> accessed 18 April 2024.

2 Kişisel Verilerin Korunması Kanunu 2016 [6698].

Articles 19-27 in Chapter 6 of the PDPL introduce and stipulate the provisions related to the establishment of the Turkish Personal Data Protection Authority (the "DPA"). The DPA is responsible for supervising the implementation of the PDPL by data controllers and other subjects of the law (Article 20). The Personal Data Protection Board (the "Board") was established as the decision-making body and is vested with certain tasks and powers.[3] The Board's responsibilities encompass ensuring compliance with personal data processing in line with fundamental rights, addressing complaints, maintaining the Data Controllers' Registry, enacting regulatory acts on various aspects including data security, and deciding on administrative sanctions as specified by the PDPL, as listed in Article 22.[4] As an example of one of the Board's rulings, on 1 March 2023, TikTok Pte. Ltd. was fined 1,750,000 Turkish Lira (approximately EUR 87,500 EUR) for not taking sufficient measures to protect users from the unlawful processing of their data.[5]

The DPA is structured and vested with powers similar to those of other regulatory administrative bodies in the Turkish legal system, such as the Competition Authority or the Banking Regulation and Supervision Authority. This role leads the DPA to act as a guardian of individuals' right to the protection of their personal data, in addition to ensuring compliance with data protection legislation. The function of regulatory supervisory bodies is crucial in safeguarding the rights and freedoms of individuals and ensuring that administrative authorities and companies comply with the law.[6]

The PDPL introduces comprehensive and systematic safeguards to the right to protection of personal data, along with various administrative sanctions to be applied in the event of a violation. The DPA is established to provide these safeguards and enforce sanctions. However, vesting these powers without an effective judicial review will undermine the rule of law and its natural consequences: legal security, legal certainty and legal predictability. The competent judicial authority will review the legality of the acts of the DPA, especially the sanctions imposed, which should also be examined in terms of

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3 Nurullah Tekin, 'Kişisel Verilerin Korunması ile İlgili Türkiye'deki Kanun Tasarısının Avrupa Birliği Veri Koruma Direktifi Işığında Değerlendirilmesi' (2014) 4 Uyuşmazlık Mahkemesi Dergisi <http://dergipark.gov.tr/doi/10.18771/umd.51258> accessed 12 February 2023.

4 'Law on Personal Data Protection Numbered 6698' <https://www.kvkk.gov.tr/Icerik/6649/Personal-Data-Protection-Law> accessed 17 February 2023.

5 'TikTok Pte. Ltd. Hakkında Kişisel Verileri Koruma Kurulunun 2023/134 Sayılı Karar Özeti' <https://www.kvkk.gov.tr/Icerik/7538/2023-134> accessed 11 March 2023.

6 Cemal Başar, 'Türk İdare Hukuku ve Avrupa Birliği Hukuku Işığında Kişisel Verilerin Korunması' (Doctoral thesis, Dokuz Eylül University 2019) 204 <https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=KFdPFVOUwKkR30JKHaFnfQ&no=Br0hJrRvY-gINNzdBdaOs4g> accessed 12 June 2023.

the right to fair trial. Until recently, the PDPL did not include a provision on the appeal process of the sanctions to be imposed by the DPA.[7] With revisions introduced on 12 March 2024 (the "Reform Law" or the "Reform"), the PDPL was amended. This Reform changed several articles of the PDPL, such as cross border data sharing and the processing of sensitive data, though this paper will focus more on changes related to administrative fines and the appeal process.[8]

This work aims to provide clarity on the data protection regime in Türkiye, while focusing on the appeal process of Personal Data Protection Board decisions. In this regard, the paper addresses the following question: *Does the Turkish data protection law provides an effective legal remedy against the decisions of the Turkish Data Protection Authority?* To achieve this aim, firstly, the types of decisions that the Board is authorised to issue will be examined, and secondly, the appeal process in the Turkish judicial system before the latest reform will be analysed. The recent amendments of the PDPL will be presented as the next item. Furthermore, the examined appeals process will be compared with the judicial review system of other Turkish regulatory administrative bodies. Thereafter, decision 2020/7518 of the Turkish Constitutional Court will enrich the discussion. Lastly, an evaluation regarding the reformed appeal process will be presented.

A. TYPES OF DECISIONS OF THE BOARD

The Board either bases its decisions on a data subject's claim of a personal data infringement or conducts an *ex officio* examination. After the examination, the Board will determine whether there has been a personal data infringement. The Board then makes one of four decisions, which will be explained in the following sections. However, before starting the appeals process, it is important to resolve one issue: identifying the type of decision made by the Board. Saygı notes that the Board's practice is to decide all matters as a whole, resulting in a single decision text that may contain multiple decisions differentiated by the case.[9] Each of these decisions may have different legal outcomes and must be carefully examined before initiating the appeals process.

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7 İbrahim Korkmaz, 'Kişisel Verilerin Korunması Kanunu Hakkında Bir Değerlendirme' [2016] Türkiye Barolar Birliği Dergisi 81 <https://kutuphane.dogus.edu.tr/mvt/pdf.php?pdf=0019944&lng=0> accessed 29 March 2023.

8 'Ceza Muhakemesi Kanunu Ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun' <https://www.resmigazete.gov.tr/eskiler/2024/03/20240312-1.htm> accessed 19 April 2024.

9 Samet Saygı, '6698 Sayılı Kanun'un Sistematiğinde Yargısal Başvuru Yolları' (2020) 2 Kişisel Verileri Koruma Dergisi 30 <https://dergipark.org.tr/en/pub/kvkd/issue/58932/738180> accessed 14 February 2023.

1. Decision Ordering the Removal of the Personal Data Violation (Article 15(5))

As the first type of decision, the Board can reach a verdict described as a mandatory instruction. This would require the data controller to cease its operations regarding the processing of personal data. According to Article 15(5) of the PDPL: "As a result of the examination made further to a complaint or *ex officio*, in cases where it is understood that an infringement exists, the Board will decide that identified infringements must be remedied by the relevant data controller and notify this decision to the relevant parties. This decision must be implemented without delay and within thirty days at the latest after the notification."[10] The wording "shall be remedied" indicates the binding nature of the Board's decisions regarding administrative law.

Saygı argues that, based on the Board's decision-making patterns, the Board does not issue this type of decision for every personal data violation incident. If a violation has already occurred, the Board will tend to impose a fine.[11] As an example of a decision of this nature, there was a case involving a bank, an asset management company and their lawyers who were accused of initiating an unlawful execution proceedings for a debt. The defendant, who submitted a complaint to the DPA, claimed that they had never been a customer of the bank, and thus the bank must have processed their data unlawfully.[12] The applicant's complaint was based on the fact that they had never been a customer of the bank, and thus the bank must have processed their data unlawfully. The DPA ordered the data controller to provide evidence confirming that the data subject's information had been updated and the debt-related information had been deleted.[13]

According to Article 18(c) of the PDPL, a failure to comply with the orders of the Board is grounds for issuing a fine. Thus, another consequence of this type of decision is the direct effect of the requirements of the Board. In this sense, if a controller does not follow the instructions issued by the Board based on the proceedings, there arises a risk of a monetary fine.

2. Decision Stopping the Processing or Transfer of Personal Data (Article 15(7))

Under Article 15(7): "The Board may decide to stop the processing of personal data or transfer of personal data abroad in the case damages which are difficult

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10 'Law on Personal Data Protection Numbered 6698' (n 5).

11 Saygı (n 10).

12 '"Bir Bankanın, Varlık Yönetim Şirketinin ve Üç Farklı Avukatın Borçlu Olmayan Ilgili Kişinin Kişisel Verisini İşleyerek Icra Takibi Başlattıkları Iddiası" Hakkında Kişisel Verileri Koruma Kurulunun 27/04/2021 Tarihli ve 2021/424 Sayılı Karar Özeti' <https://www.kvkk.gov.tr/Icerik/7114/2021-424> accessed 6 June 2023.

13 ibid.

or impossible to compensate for, and in the event of explicit infringement of the law."[14]

This provision should be interpreted in the context of Article 22(1)(c) of the PDPL, is dedicated to the list of duties and powers appointed to the Board. It is stated that the Board can take temporary measures when conducting research on an alleged violation. According to Saygı, decisions that fall under this category would be a temporary protection measure under Article 22(1)(c). Additionally, he comments that, with this provision, the aim of the lawmaker is to prevent any further costs that could arise as a consequence of the violation.[15]

3. Resolution Decisions (Article 15(6))

Article 15(6) reads as follows; "As a result of examination made upon complaint or ex officio, in cases where it is determined that the infringement is widespread, the Board shall take a resolution on this matter and publishes this resolution in the Official Gazette. Prior to taking the resolution, the Board may also receive the opinions of the relevant institutions and organisations, if needed."[16]

This provision indicates that decisions categorised as resolutions specify how the law should be interpreted and applied in specific cases. In this sense, if the Board determines that the acts constituting a violation have been committed not only by the data controller complained against, but also by other individuals and institutions, then the Board takes a decision on how to decide on that particular matter and declares it publicly.

Therefore, resolution decisions must be considered as decisions showing how the PDPL will be understood and applied. In a way, they create new norms and have legal consequences for their addressees. Furthermore, Article 18(1)(c) regulates not complying with the decisions rendered pursuant to Article 15 as a misdemeanour under the PDPL. In other words, anyone who fails to implement the Board's resolution decisions may be subject to administrative fines. In this respect, resolution decisions can be considered as decisions that have a coercive nature for the relevant parties and therefore have legal consequences.[17]

Examining the resolution decisions taken by the Board reveals that the Board employs this type of decision when it identifies a widespread violation. For instance, one of the most recent resolution decisions rendered by the Board concerned municipalities using payment systems that have a major security flaw. The decision begins with an explanation of the current system and the reasons

14 'Law on Personal Data Protection Numbered 6698' (n 5).

15 Saygı (n 10).

16 'Law on Personal Data Protection Numbered 6698' (n 5).

17 Saygı (n 10) 54.

why it is vulnerable to personal data violations. It concludes with the actions that must be taken by municipalities. Moreover, the Board states the necessary actions in a clear manner, as can be seen in the following: "municipalities must use the 'membership and password' method or 'two-factor verification' system in their real estate tax payment/fast payment and debt inquiry services as per Article 12 of the Law."[18] The resolution decisions of the Board are also made public pursuant to Article 15(6) of the PDPL.[19]

4. Decisions Imposing a Monetary Fine (Article 18)

Decisions imposing a monetary fine are outlined in a separate article dedicated to misdemeanours as defined by the PDPL. Article 18 first lists the actions identified as misdemeanours according to the PDPL, and then provides specific circumstances related to implementing sanctions. The list of actions stated in Article 18(1) includes: a) non-compliance with the obligation to inform (Article 10), b) non-compliance with obligations of data security (Article 12), c) non-compliance with the obligation to register with the Data Controllers' Registry (Article 16).[20] It should be noted that the amount of fine for each misdemeanour will be updated each calendar year. According to the last update, the minimum amount is TRY 47,303 and the maximum amount is TRY 9,463,213.[21] The remaining sub-paragraphs of Article 18 state that these fines can only be issued to individuals and private law legal entities. If a public institution or organisation commits any of the listed actions, disciplinary provisions will be applied and the Board will be informed about the investigation and outcomes.[22]

The significant gap between the maximum and minimum amount of the fine was discussed during the law-making process.[23] When the preamble of the PDPL examined, particularly Article 18, the reason behind the gap between the minimum and maximum amount of monetary fines is explained as granting the Board the

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18 'Resolution of the Personal Data Protection Board Dated 21/04/2022 and Numbered 2022/388 on Payment and Debt Inquiry Services of Municipalities' <https://www.kvkk.gov.tr/Icerik/7415/2022-388> accessed 3 March 2023.

19 'Law on Personal Data Protection Numbered 6698' (n 5). Full text of Article 15(6): "As a result of the examination made upon complaint or ex officio, in cases where it is determined that the infringement is widespread, the Board shall take a resolution on this matter and publishes this resolution. Prior to taking the resolution, the Board may also receive the opinions of the relevant institutions and organisations, if needed."

20 ibid.

21 KİŞİSEL VERİLERİ KORUMA KURUMU, '6698 Sayılı Kişisel Verilerin Korunması Kanunu Kapsamında İdari Para Cezası Tutarları' <https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/8833aad2-62c2-4a01-b147-fe97062678f3.pdf> accessed 15 February 2024.

22 'Law on Personal Data Protection Numbered 6698' (n 5).

23 Mehmet Bedii Kaya, 'Kişisel Veri Koruma Hukuku - Mevzuat, İçtihat, Bibliyografya' 43.

power of discretion.[24] This reasoning is derived from the Misdemeanour Law number 5326, Article 17(2) of which implies that authorities should consider the severity of the misdemeanour, the fault of the perpetrator and their economic status when making a decision in this manner. For example, if a family business operating in a small city and a nationwide holding company violate the same provisions of the Misdemeanour Law, the amount of administrative fines to be determined will be different, based on the economic status of the infringers.[25]

B. APPEAL PROCESS AGAINST THE BOARD DECISIONS BEFORE THE REFORM

Before the March 2024 reform, there were no provisions concerning appeals or the appellate court in the PDPL. Therefore, every decision of the Board had to be examined individually and its legal classification had to be determined through independent analysis. Only this way could any judicial remedy against the Board's decisions be identified under the Turkish legal system.[26]

The first two types of decisions, namely "termination of the processing or transfer of personal data" and "instruction decision to eliminate the personal data violation," were subject to administrative law, as they are also administrative acts unilaterally taken by the administrative body. Therefore, the appeals process would also be governed by the Administrative Jurisdiction Procedure Law number 2577. In this regard, an application to annul an action may be submitted within 60 days after receiving the Board's decision. The competent court would be determined based on the general competency rules of the Administrative Jurisdiction Procedure Law. However, the appeal process for decisions imposing a monetary fine was not as clear.

Decisions imposing a monetary fine are considered punitive actions for misdemeanour acts listed in Article 18 of the PDPL. As a result, they fall under the Law on Misdemeanours number 5326. According to Article 27 of the Law on Misdemeanours, administrative fines imposed by the Board may be appealed against to the first instance of the criminal magistrate court within 15 days from the date of notification. The competent court would be the court of the data controller's residential city, based on the interpretation of Articles 12 and 13 of the Law on Misdemeanours.[27]

Lastly, the Board's decision-making practice shows that there can be hybrid decisions where the Board issues multiple types of decisions in one ruling. Even if one of the decisions is an administrative fine, the competent court for

24 ibid 42.

25 ibid 43.

26 Saygı (n 10) 44.

27 ibid 49.

judicial review would still be the administrative courts, according to both İnan and Saygı. Both argue that there is no provision in the Law on Misdemeanours that would act as a restraint in this regard. However, both decisions that will be subject to administrative judicial review must be imposed due to the same act or within the scope of the same violation of the law. In other words, there must be a material or legal connection between the two actions.[28]

Briefly it can be expressed that, prior to the Reform, there was a dual review practice against decisions of the Board. Administrative monetary fines imposed by the Board could be appealed to the criminal judgeship of peace, while the remaining part of the decisions could be appealed to the administrative judiciary for review. Consequently, this practice reduced the effectiveness of the review process for the decisions of the Board.

C. CHANGES INTRODUCED WITH THE PDPL REFORM

The PDPL is based on Directive 95/46/EC, the predecessor of the General Data Protection Regulation (the "GDPR"). Two years after the PDPL came into force, the GDPR was adopted and introduced a more advanced set of rules in the field of data protection. Therefore, the idea of updating the PDPL had been floated and a discussion topic in recent years. This could be observed in the preamble of the Reform Law, which states: "After the entry into force of the General Data Protection Regulation, various action plans included the goal of updating Law No 6698 by taking into account the GDPR. Announced in 2021, the Human Rights Action Plan, the Economic Reforms Action Plan and the 2024-2026 Medium Term Programme included the objectives of harmonisation with the GDPR. In this context, with the Proposal, amendments are made to the provisions regarding the processing conditions of special categories of personal data and data transfer abroad."[29] Although the preamble mentions topics regarding special categories of data and cross-border data sharing, there are provisions related to the appeal process and monetary fines stated in the PDPL.

The third subparagraph of Article 35 of the Reform Law indicates the competent court to hear appeals against Board decisions as administrative courts.[30] With

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28 ibid 51; Salih İnan, 'Kişisel Verilerin Korunması Kapsamında İhdas Edilen Yaptırım Kararlarına Karşı Yargısal Başvuru Yolları: Karşılaştırmalı Bir İnceleme' (2021) 3 Kişisel Verileri Koruma Dergisi 34, 56 <https://dergipark.org.tr/en/pub/kvkd/issue/67484/1036379> accessed 14 February 2023.

29 'Ceza Muhakemesi Kanunu ile Bazı Kanunlarda ve 659 Sayılı Kanun Hükmünde Kararnamede Değişiklik Yapılmasına Dair Kanun Teklifi ve Gerekçesi' 15 <https://cdn.tbmm.gov.tr/KKBSPublicFile/D28/Y2/T2/WebOnergeMetni/6e8b6477-2942-49d1-acf1-cfa13b-cac252.pdf>. (author's translation)

30 'Ceza Muhakemesi Kanunu Ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun' (n 9). Author's translation of the Art. 35(3): Administrative fines imposed by the Board could be appealed to the administrative courts.

this provision, it is now clear that administrative fines imposed by the Board will be subject to administrative judicial review.

With Article 35 of the Reform Law, another misdemeanour action is stipulated as added into Article 18 of the PDPL. The fifth paragraph of Article 9 is another amendment introduced by the Reform Law, establishing the concept called 'standard contractual clause' to be used in cross-border data transfers. Pursuant to the new paragraph 5 of Article 9 of the PDPL, a standard contract clause must be notified by the data controller or the data processor to the DPA within five business days of being signed. The notification obligation for standard contracts is also sanctioned. With subparagraph (d) added to the first paragraph of Article 18, it is regulated that those who fail to comply with this five business day notification requirement regarding standard contractual clauses are subject to an administrative fine of between TRY 50,000 and TRY 1,000,000.[31]

Article 35(2) of the Reform Law presents another novelty in terms of implementing administrative fines. It states that "The administrative fines stipulated in subparagraphs (a), (b), (c) and (ç) of the first paragraph shall be imposed on the data controller, and the administrative fine stipulated in subparagraph (d) shall be imposed on the data controller or data processing natural persons and private legal entities."[32]

D. APPEAL PROCESS OF OTHER REGULATORY ADMINISTRATIVE AUTHORITIES

As stated above, the DPA is also a regulatory administrative authority ("RAA") in the Turkish legal system, as specified in the PDPL. According to Article 19 of the PDPL, "Personal Data Protection Authority, which is a public legal entity and has administrative and financial autonomy, has been established to carry out duties conferred on it under this Law."[33] Furthermore, Article 21(1) states that "The Board shall perform and exercise the duties and powers conferred on it under this law and other legislation, independently and under its own responsibility."[34] Pursuant these provisions, there is no doubt that the DPA is an RAA, but the legal classification of RAAs in general is a highly debated topic in Turkish legal doctrine.[35]

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31 ibid. (author's translation)

32 ibid. (author's translation)

33 'Law on Personal Data Protection Numbered 6698' (n 5).

34 ibid.

35 Yahya Usman, 'Kişisel Verileri Koruma Kurumunca Uygulanan Yaptırımların Yargısal Denetiminde Görevli Mahkeme' (2021) 16 Terazi Hukuk Dergisi <https://www.jurix.com.tr/article/22668> accessed 1 March 2023.

RAAs became a part of Turkish administrative law with the adoption of liberal policies in the early 1980s. As a result, the first RAA – the Capital Markets Board of Türkiye – was established in 1981.[36] Afterwards, with the requirement of Customs Union Decision 1/95[37] the Turkish Competition Authority was founded in 1994[38] which then stood as a model for other institutions. The Banking Regulation and Supervision Agency, the Energy Market Regulatory Authority and the Public Procurement Authority are examples of public bodies established under this structural reform.[39]

The judicial review process for decisions and actions of RAAs is usually outlined in their founding laws, and, according to administrative law, the competent authority is usually the administrative courts, and rarely the Council of State, unless explicitly provided in the law.[40] For instance, Article 55 of the founding law of the Turkish Competition Authority points out that decisions on administrative sanctions can be appealed to the competent administrative court.[41] A similar provision can be found in the founding law of the Energy Market Regulatory Authority. Article 12 determines that the competent administrative court will be the judicial office to conduct the judicial review.[42] Başar also remarks that, as a rule, RAAs are subject to administrative law in their activities, and disputes arising from their activities are resolved in the administrative jurisdiction.[43]

E. DISCUSSION

The absence of a provision indicating the competent judicial authority for appealing the Board's decisions was criticised as being in conflict with Article

36 Nagehan Talat Aslan, 'Yönetimin Yeni Yapı Taşları Bağımsız İdari Otoriteler' (2010).

37 Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union 1995 (OJ L).

38 Emre Baş, 'Türkiye'deki Bağımsız İdari Otoriteler ve Uygulaması' (Master's Thesis, Karadeniz Teknik Üniversitesi 2010) <https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/490483/yokAcikBilim_389238.pdf?sequence=-1&isAllowed=y> accessed 3 March 2023.

39 Yavuz Göktaylar, 'The Rise of Independent Administrative Authorities in Turkey: A Close Look on Sources, Successes and Challenges of This New Institutional Transformation' (2011).

40 Oğuzkan Güzel, 'Bağımsız İdari Otoritelerde İdari Usul ve Yargısal Denetimi' (Doctoral thesis, Ankara University 2007) <https://tez.yok.gov.tr/UlusalTezMerkezi/tezDetay.jsp?id=D-K1aB-SQzTTZDCoaZb7Xxg&no=R1bRQhCmditkKAVPJv2DIA> accessed 21 February 2023.

41 'Rekabetin Korunması Hakkında Kanun' <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4054.pdf> accessed 23 April 2024.

42 'Enerji Piyasası Düzenleme Kurumunun Teşkilat ve Görevleri Hakkında Kanun' <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4628.pdf> accessed 24 April 2024.

43 Başar (n 7) 207.

40(2) of the Turkish Constitution.[44] According to Article 40, "The State is obliged to indicate in its proceedings the legal remedies and authorities the persons concerned should apply to, and the time limits of the applications."[45] This provision is important for the protection of the individuals' right to legal remedy. By applying this provision and indicating the competent authority, the individual's right to data protection would be subjected to effective scrutiny.

In the first draft of the PDPL, there was a provision in Article 18 (4th subparagraph) stating that "Those concerned may file a lawsuit against the administrative sanction decisions of the Board before the administrative courts." However, this clause was removed during the discussions of the law in the process of committees. The subcommittee report stated that the provision was deliberately removed from the draft law to ensure the application of the Law on Misdemeanours for decisions about monetary fines.[46] As a result, there was no provision for regulating the competent authority for the judicial review of the Board's decisions.

The fact that the relevant criminal judgeship of peace was assigned as the competent judicial authority by the interpretation of the PDPL added another aspect to this debate. The jurisdiction of these courts, as stated in the document prepared by the Ministry of Justice, is limited to handling minor crimes involving a penalty of less than two years of imprisonment or only a fine or security measure.[47] Their main assignment is to resolve petty crimes and misdemeanours, such as detention decisions and objections to traffic tickets. Furthermore, the trial process therein is subject to simplified trial procedures, with decisions reached based on the information in the case file. This means that they reach verdicts quickly, without going through a full procedure and have a single judge in the court.[48]

Assigning additional responsibilities to the criminal judgeship of peace in an area that requires specialised knowledge, such as personal data protection, will directly affect the quality of the system. Another problem is the extent to which these courts function properly in Turkish legal practice. Assigning a function regarding personal data protection to this mechanism will pose a problem for

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44 Saygı (n 10) 44.

45 'Turkish Constitution' <https://www.anayasa.gov.tr/en/legislation/turkish-constitution/> accessed 9 February 2023.

46 Saygı (n 10) 44.

47 Ministry of Justice, 'The Judicial System of Turkey and Organisation of the Ministry of Justice' 11 <https://diabgm.adalet.gov.tr/Resimler/SayfaDokuman/2492019170148THE_JUDICIAL_SYSTEM_OF_TURKEY_AND_ORGANISATION_OF_THE_MINISTRY_OF_JUSTICE.pdf> accessed 4 January 2023.

48 Zahit Yilmaz and Özge Apiş, 'Seri Muhakeme ve Basit Yargılama Düzenlemelerinin Değerlendirilmesi' (2020) 26 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 62, 65 <http://dergipark.org.tr/tr/doi/10.33433/maruhad.733175> accessed 15 June 2023.

the quality of the system.[49]

In addition, as explained above, the main focus of these courts is on the field of criminal justice. The decision-making processes of criminal courts and administrative courts differ in many components. Compared to the criminal judgeship of peace, administrative courts are more competent and experienced in reviewing the legality of administrative decisions and resolving conflicts in this sense. Therefore, it is clear that the administrative court review process is more suitable for the judicial review of Board decisions, as it provides a more thorough review process.

One of the latest decisions of the Turkish Constitutional Court is significant in this context. In its decision dated 12 October 2023 and numbered 2020/7518, the Constitutional Court ruled that the deficiencies in proceedings to complain against an administrative fine imposed by the Turkish DPA against a global hotel chain, which the DPA found to have breached its obligations to ensure data security, violated the complainant's right to property. The Constitutional Court decided that a retrial must be held to rectify the consequences of the violation of rights.

The complainant appealed against the administrative fine before the Istanbul Anatolian 1st Criminal Judgeship of Peace. In the appeal, it claimed that all necessary technical and administrative measures had been taken, and that the infringement was detected and notified in a short period of time, along with other claims. The complainant also argued that the imposition of administrative fines at the highest level was disproportionate and infringed their right to property.

However, the Istanbul Anatolian 1st Criminal Judgeship of Peace rejected the complaint, stating that the act subject to the administrative fine had been determined with the decision issued by the DPA and that the administrative fine was therefore in accordance with the law and procedure. The complainant's appeal against this decision to the Istanbul Anatolian 2nd Criminal Judgeship of Peace under the Misdemeanours Law was also rejected on the grounds that "there is no procedural and legal violation and there is nothing to change in the decision."[50] With this decision appeal process to the administrative fine concluded, the complainant could only take this decision to Turkish Constitutional Court.

After reviewing the case, the members of the Constitutional Court determined that the Applicant's claims against the decision were important and should have been evaluated within the entire judicial process. The criminal judgeship of peace did not make an assessment within this framework. Furthermore, the procedural safeguards for the protection of the right to property within the scope of a fair trial were not fulfilled in the case, resulting in a violation of the complainant's right to property. Therefore, according to the decision of the Constitutional

49 İnan (n 29) 57.

50 *Case numbered: 2020/7518* (Turkish Constitutional Court).

Court, a retrial was required in order to eliminate the violation of rights, and the complainant's claims must be comprehensively re-evaluated.[51]

Interpretation of the Turkish Legislator's Choice in light of the EU Data Protection Legislation

Article 28 of Directive 95/46/EC sets out that the EU legislator chose to leave the regulation of legal remedies to the discretion of Member States. According to Article 28 of the directive, each Member State is required to establish independent supervisory bodies "responsible for monitoring the implementation of the provisions adopted pursuant to the Directive."[52] In addition, paragraph 6 of Article 28 stipulates: "Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3."[53]

Galetta and De Hert, argue that the provisions on remedies under Directive 95/46/EC are vague and lack detail on how data protection breaches should be remedied or what sanctions should be imposed.[54] However, they note that the GDPR introduces a more articulated legal remedy system, reducing this ambiguity.[55] Indeed, with the GDPR's Article 78, a mandatory and more detailed legal remedy system was set out.[56] At this point, it is sensible to question the reason behind Turkish legislator's choice to adopt Directive 95/46/EC, even though the proposal for GDPR was published in 2012.[57]

To set an example to Member States' implementation of the GDPR, a closer look at Austria's Data Protection Law (the "DSG") reveals insights into legal

51 ibid 63.

52 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

53 ibid.

54 Antonella Galetta and Paul De Hert, 'The Proceduralisation of Data Protection Remedies under EU Data Protection Law: Towards a More Effective and Data Subject-Oriented Remedial System?' (2015) 8 Review of European Administrative Law 125, 128.

55 ibid 148.

56 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016.

57 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012PC0011> accessed 10 June 2023.

remedies against the decisions of a data protection authority.[58] Article 24 of the DSG outlines the Austrian authority's commitment to resolving complaints within a three-month timeframe and subsequently informing the applicant. Following this, Article 27 of the DSG grants the applicant the right to appeal the decision to the Federal Administrative Court. The second paragraph of that article details the formation of the panel of judges, emphasising the inclusion of lay judges. Additionally, the third paragraph specifies that expert lay judges must possess a minimum of five years of relevant professional experience and specialised knowledge in data protection law.[59]

The regulatory framework in Austria underlines the acknowledgment by Austrian lawmakers of the importance of expertise and rigorous legal examination in the realm of data protection law. This recognition serves as a key distinguishing factor. While the designation of administrative courts by the Reform Law could be considered as progress, the failure to require any proficiency for the judges indicates that there is still room for improvement. Data protection law is an ever-evolving field and with technological developments, the technical implementation of legal rules calls for expertise. For instance, Article 12 of the PDPL lists the obligations that a data controller must abide by, and subparagraph (c) indicates that one of these is "ensuring the protection of personal data"; thus, non-compliance with this provision could result in a fine issued by the DPA. Consequently, if an appeal against this decision is heard in front of a judge, the judge must be able to assess whether the data controller deployed appropriate safeguards or not. Hence, the lack of a provision on expertise in the Reform Law indicates that this crucial aspect has been overlooked.

CONCLUSION

This study undertakes an analysis of the types of decisions issued by the Turkish DPA and the legal remedy procedures available under Turkish law. Looking at the situation from before the Reform, a significant gap becomes apparent, especially concerning the judicial review process for decisions imposing a monetary fine, which is not directly addressed in the PDPL. This omission has resulted in a considerable amount of uncertainty within the legal landscape. Before the Reform, the Board's decisions were subjected to a dual judicial review process that meant no precedent was formed. During this period, the competency of the

58 'Federal Act Concerning the Protection of Personal Data (DSG)' <https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=25a20e90-04d7-4b06-aadc-83c8c93c6144&Position=1&SkipToDocumentPage=True&Abfrage=Erv&Titel=&Quelle=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ImRisSeitForRemotion=Undefined&ResultPageSize=100&Suchworte=data+protection&Dokumentnummer=ERV_1999_1_165> accessed 14 June 2023.

59 ibid.

single courts was subject to debate, given their nature as criminal courts with a single judge and adherence to a straightforward trial process. Moreover, their lack of specialisation in the area of data protection law raised serious concerns. Consequently, this system failed to provide an effective legal review. A recent decision by the Constitutional Court further emphasised the inadequacy of the previous legal review system. This decision served as compelling evidence that a re-evaluation and enhancement of the judicial review process was imperative, emphasising the pressing need for comprehensive reforms in this crucial aspect of data protection law in Türkiye.

It is not very common for a legal scholar to experience a reform on the exact thing that they were criticising. As a matter of fact, while writing this study, the PDPL has been subject to a reform. The ramifications of the Reform were discussed in this sense. Although the Reform has some shortcomings, the amendments regarding the appointment of administrative courts could be considered as progress. Judicial review, being the cornerstone of scrutiny in a rule-of-law framework, necessitates proper regulation and integration into the judicial system in order to be effective. Without this, the achievements made thus far may risk proving futile. In terms of legal security and certainty, the Reform Law has therefore met an important need.

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Kişisel Verilerin Korunması Kanunu 2016 [6698]

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END OF "END OF HUMAN RIGHTS" DEBATE: CRITICAL JUNCTURES AND INCREMENTAL CHANGES OF HUMAN RIGHTS*

"İnsan Haklarının Sonu" Tartışmasının Sonu: İnsan Haklarında Kritik Dönüm Noktaları ve Kademeli Değişimler

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Abstract

Many scholars emphasize that human rights face a major challenge: the gradual erosion and end of human rights. This erosion has led to a rethinking of the balance between security and rights and freedoms, and raised concerns about how reliable human rights are in the face of changing political dynamics. Minority and marginalized groups suffer from discrimination and systematic persecution, while the rise of control technologies and authoritarian regimes exacerbate these challenges. The post-9/11 era was thought to be the "end of human rights" as debates over the legitimacy of measures such as torture were driven by security needs. However, technological developments and historical trends suggest otherwise. Human rights have experienced (i) critical junctures through political decisions, and (ii) incremental changes through judicial protections and activism by civil society organizations, which both lead to empower the understanding and application of human rights. The debate about the "end of human rights" continues but is essentially misleading. However, the changes that have occurred in the history of human rights demonstrate consistent and continuous progress, driven by political and judicial decisions.

Keywords: end of human rights, Post-9/11 security measures, political decisions as critical junctures, judicial protections as incremental changes, accountability mechanisms, historical trends of human rights

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Özet

Akademi ve uygulayıcılar, insan haklarının önemli bir zorlukla karşı karşıya olduğunu vurgulamaktadır: insan haklarının kademeli bir şekilde aşınması ve sonunun gelmesi. Bu aşınma, insan haklarının güvenlik ile haklar ve özgürlükler arasındaki dengeyi yeniden düşünmeye yol açmış ve değişen siyasi dinamikler karşısında insan haklarının ne kadar güvenilir olduğu konusunda endişeleri artırmıştır. Azınlık ve marjinal gruplar, ayrımcılık ve sistematik zulümden muzdarip olurken, kontrol teknolojilerinin ve otoriter yönetimlerin yükselişi bu zorlukları daha da kötüleştirmektedir. 11 Eylül sonrası dönemde, işkence ve insanlık dışı muamelenin meşruiyeti üzerine yaşanan tartışmalar ile güvenlik gereksinimleri nedeniyle alınan aşırı tedbirler, "insan haklarının sonu" tartışmasını öne çıkarmıştır. Esasında "İnsan haklarının sonu" tartışması oldukça yanıltıcı. Zira teknolojik gelişmeler ve tarihsel trendler bu tartışmanın aksi yönünde veriler sunmaktadır. İnsan hakları tarihi, iki farklı şekilde insan hakları alanında tutarlı ve sürekli ilerlemeler kaydedildiğini göstermektedir: i) kritik dönüm noktaları (critical junctures) olan siyasi kararlarla ve ii) mahkeme ve BM komisyon kararları ve insan hakları konusunda çalışan çoğu STK'ların çabalarıyla gerçekleşen kademeli değişimlerle (incremental changes).

Anahtar Kelimeler: insan haklarının sonu, 11 Eylül sonrası güvenlik önlemleri, kritik dönemeçler olarak siyasi kararlar, kademeli ilerlemeler olarak yargı kararları, hesap verebilirlik mekanizmaları, insan haklarının tarihi trendleri

INTRODUCTION

The landscape of human rights faces a complex and multifaceted challenge: not overt assault, but a gradual erosion through seemingly isolated incidents and normalized practices. This insidious trend manifests in various forms, as documented by many scholars all over the world.[1] We have witnessed many developments that threaten and have a potential to restrict or annihilate the human rights.

On the one hand the bomb attacks, massacres, civil wars on the other measures are taken after September 11 attacks which resemble the "enemy criminal law" [criminal law of the enemy; -ger. Feindstrafrecht] policy and the violation of the basic rights and freedoms. For example, the violations of right to life and liberty all around world and the prohibition of torture in prisons in which Guantanamo or Abu Ghraib. Likewise, many of the writers propound after the terrorist attacks around the world, the politics of human rights has been changed

[1] Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013); Philip Alston, 'Human Rights Under Siege: How to Respond to the Populist Threat Facing Human Rights' (2017) 14 Sur - International Journal on Human Rights 267; Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2019).

and the balance between the rights/freedoms and security has been altered to the detriment of rights/freedoms.

Some declare that human rights are in crisis[2] and some others question whether human rights can survive.[3] World politics has been seen as to steer for taking measure to security then strengthen or vivify the idea of human rights.[4] Thus, the language of politics went beyond the human rights because their language deteriorates difference and otherness and cannot lead emancipation.[5]

On the other hand, one concerning example lies in the growing use of surveillance technologies, blurring the lines between legitimate security measures and mass data collection. Such practices can create chilling effects on freedom of expression and association, documented by international organizations like Privacy International.[6]

Furthermore, the erosion of democratic institutions and the rise of authoritarian leaders pose a significant threat. These actors often weaken judicial independence, manipulate elections, and crackdown on dissent, eroding the very foundations of human rights protections, furthermore, the plight of minorities and marginalized groups further highlights this erosion.[7]

From discriminatory policies against refugees and migrants, to the systematic persecution of religious minorities, documented by organizations like Amnesty International, these groups bear the brunt of weakening human rights standards. Holding governments accountable through mechanisms like the United Nations Human Rights Council and regional human rights courts is crucial. Empowering civil society organizations and fostering a culture of human rights awareness are equally important. Ultimately, safeguarding human rights demands constant vigilance and collective action to resist the tides that threaten to erode these hard-won gains.

Obviously, soon after the 11 September incident, the environment for the human rights has changed drastically and some of the advances which have

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2 Geneviève Souillac, *Human Rights in Crisis: The Sacred and the Secular in Contemporary French Thought* (Lexington Books 2005).

3 Conor Gearty, *Can Human Rights Survive?* (1st edition, Cambridge University Press 2006) 26.

4 Richard A Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge 2000) 217.

5 Stewart Motha and Thanos Zartaloudis, 'Law, Ethics and the Utopian End of Human Rights' (2003) 12 Social & Legal Studies 243.

6 Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs Books 2019).

7 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown Publishing 2018).

already been achieved face in jeopardy. Michael Ignatieff, the liberal human rights defender, has presented the idea of "the end of human rights"[8], at the same time with the Costas Douzinas[9]. Ignatieff has predicted that the "in the wake of the terrorist attacks, security would become the prime concern of governments and the age of human rights and humanitarianism would draw to a close".[10] According to Douzinas there was a post-Second War Western consensus that there are certain acts like torture, that intolerable among the liberal-democratic society. And such kind of acts, has been told, were taken under dictatorships or totalitarian regimes. However, this consensus was broken after 11 September.[11] Thus torture and its morality or legitimacy has become a debatable issue under ethical studies and conferences are organized, papers are published. Liberal writers such as Alan Dershowitz and Ignatieff has offers terms such as "torture warrant", "sunset clause" or "lesser evil strategy" for legalizing torture through.[12] As for Bruce Ackerman, although he opposed the idea of torture, supports "preventive detention of suspects" and introduction of "emergency constitutions" for limited periods[13] in order to minimize the possibility of terrorism.

Furthermore, within this period of time there were also invasions of Afghanistan, Iraq and Libya and the documented violations of human rights. "These victories have been drowned in a human rights disaster for the local people"[14] and, they overshadowed the attempts for strengthening the culture and progress of human rights at a global scale. As a result of such incidents and spreading discussion about "the end" of everything; ideology, history, utopia etc. over on-going human rights debate, pave the way for idea of the end of the human rights. Therefore, it is vital to ask whether these -and other not mentioned as well- indicators are

8 Michael Ignatieff, 'Opinion | Is the Human Rights Era Ending?' *The New York Times* (5 February 2002) <https://www.nytimes.com/2002/02/05/opinion/is-the-human-rights-era-ending.html> accessed 12 March 2024.

9 Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000) 380; Costas Douzinas, 'The End(s) of Human Rights' (2002) 26 Melbourne University Law Review 445.

10 Ignatieff, 'Opinion | Is the Human Rights Era Ending?' (n 8).

11 Costas Douzinas, *The End of Human Rights* (n 9).

12 Alan M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press 2002); Michael Ignatieff, *The Lesser Evil | Princeton University Press* (Princeton University Press 2005); Michael Ignatieff, 'Lesser Evils' *The New York Times* (2 May 2004) <https://www.nytimes.com/2004/05/02/magazine/lesser-evils.html> accessed 12 March 2024."plainCitation":"Alan M Dershowitz, Why Terrorism Works: Understanding the Threat, Responding to the Challenge (Yale University Press 2002

13 Bruce A Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006) 14."plainCitation":"Bruce A Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (Yale University Press 2006

14 Costas Douzinas, *The End of Human Rights* (n 9) 7.

reliable, satisfying, and sufficient for such kind of an inference that "we have reached the end of human rights era".

In this respect, I will discuss and oppose the "idea of the end of human rights" by bring forward three arguments which are first, discussions on the core of rights, secondly the gap between rhetoric and reality / theory and practice, finally but the most importantly implications taken from the history of human rights.

HOW RELIABLE THE ARGUMENTS ON END OF HUMAN RIGHTS?

A. The Notion of Human Rights

First of all, "it is axiomatic that the historic mission of 'contemporary' human rights is to give voice to human suffering, to make it visible, and to ameliorate it."[15] In other words, concept of human rights becomes visible or revive when pain and suffering is occurred. According to Baxi, however, this is not the only case but "even human rights regimes enact a hierarchy of pain and suffering."[16] I would prefer to name this issue as "cycling effect". Pain or suffering and the concept of human rights are coexisted and support each other.

Luhman's theory on autopoietic systems, which means self-reproduction of systems such as law, politics or economy by using communication as an element, stipulates that concepts/elements are produced as a result of being used.[17] Thus, current developments (violations, measures and criticisms) will again trigger the concept of human rights and whenever it is discussed or criticized, it re-produces itself.

Secondly, human rights are used and understood in a different way throughout the world and history.[18] Baxi has proposed that there are two different notions of human rights: modern and contemporary. Modern notion is characterized by setting rules, but contemporary by setting standards.[19] In other words, in contemporary world the rights are accurate, but they may conflict with each other, so it is needed to set off limits and case-by-case basis to search for solutions to reconcile competing rights. I would prefer to name this issue as "balancing effect".

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15 Upendra Baxi, *The Future of Human Rights* (Third Edition, Oxford University Press 2008) 4.

16 ibid 18.

17 Niklas Luhmann, 'The Autopoiesis of Social Systems' in Felix Geyer and Johannes van der Zouwen (eds), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Sage Publications 1986); Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004).

18 Upendra Baxi (n 15) 33.

19 Euan MacDonald, 'Review Essay - The Future of Human Rights? Theory and Practice in an International Context: Review of Upendra Baxi's The Future of Human Rights' (2004) 5 German Law Journal 969, 973.

Nevertheless, the distinction is occurred not only in limit setting/reconciling process but also in legal texts. For example, current developments urge states to reconsider the balance and the limit between two rights: protection of private life and family and right to life liberty and personal security. With the measures taken after 11 September, the balance between those two rights is change to the detriment of prior. Also, it is possible to observe different legal text outlines different bunch of fundamental rights all over the world. The changing balance between two rights does not indicate end of human rights, which indicate one right gains strength against the other. The noteworthy point is that whether new developments are jeopardizing the "substantial core" of the rights.

B. The Gap Between Rhetoric and Reality

Indeed, the end of the human rights discussions derived from an argument -prefer to call this an illusion- which is the gap between rhetoric and reality / theory and practice. This gap gives rise to illusion of "end" issue. The underlying reason for this gap between targets and achievements is derived from the role of the states in today. Governments have eagerness to improve and promote human rights protection in their national legal system; however, most of them are suffered from the insufficient sources and capacity for making meaningful changes.

On the other hand, advancements in information technologies have brought about a significant shift in the visibility of human rights violations.[20] The advent of digital technologies has greatly facilitated individuals' ability to access information pertaining to human rights violations on a global scale. Internet connectivity enables individuals to get knowledge about transgressions occurring in foreign nations or within their own nation, peruse information, and strategize courses of action pertaining to these matters. These advancements have enabled expedited and more extensive communication and dissemination of information. Social media and internet platforms provide individuals with the means to express their viewpoints, disseminate their personal encounters, and bring to light instances of human rights transgressions. For instance, reports of numerous infringements on human rights rapidly disseminate on social media platforms such as Twitter, Facebook, or Instagram, captivating the interest of millions of individuals.[21] This facilitates the dissemination of previously unnoticed or disregarded events to a broad audience.

The advent of information technologies has facilitated the instantaneous capturing and sharing of images and movies among individuals. This serves as a

[20] Molly K Land and Jay D Aronson, *New Technologies for Human Rights Law and Practice* (Cambridge University Press 2018).

[21] Howard Tumber and Silvio Waisbord, *The Routledge Companion to Media and Human Rights* (Routledge 2017).

potent instrument for recording instances of human rights infringements. Visual evidence serves as a means to substantiate the veracity of events and ascertain the identities of those responsible. Similarly, the emergence of independent journalists and bloggers who not only rely on traditional media sources but also utilize online channels to disseminate reports on human rights breaches. This facilitates the inclusion of more news sources and other perspectives, hence enhancing the comprehensiveness of event coverage.

In summary, the progression of information technologies has played a significant role in enhancing the visibility of human rights breaches and creation of illusion that violations cannot be addressed or redressed. Nevertheless, it is crucial to bear in mind that these technical advancements also give rise to apprehensions regarding privacy and security.

C. Nature of International Law on Human Rights

The issue concerning the nature of international law, particularly in relation to human rights, has sparked considerable debate and critique within legal scholarship. Balakrishnan Rajagopal, a prominent legal scholar, argues that the movement of human rights, despite the adoption of the United Nations (UN) Universal Declaration of Human Rights, is afflicted with a fundamental flaw stemming from its historical failure to challenge colonialism. Rajagopal contends that many human rights treaties were crafted by colonialist powers, primarily European nations, which inherently taints the legitimacy and universality of these rights.[22] Furthermore, he questions the future trajectory of human rights, raising doubts as to whether they transcend mere politics or devolve into idolatry.

This critique underscores the complex dynamics surrounding the universality, inalienability, and indivisibility of human rights, which can potentially be manipulated as instruments of hegemony. For instance, Costas Douzinas highlights how human rights can function as ideological tools of empire, serving to legitimize and perpetuate dominant power structures.[23] However, Richard Falk offers a nuanced perspective, noting that while the imposition of human rights norms may act as a constraint on interventionist diplomacy, it also paradoxically provides a pretext for intervention, as exemplified by the concept of the "responsibility to protect" (R2P) norm utilized in the 2011 Libyan intervention.[24]

This contradiction inherent within the nature of international law reflects its historical dual role: serving the interests of powerful states and elites, while

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22 Balakrishnan Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27 Third World Quarterly 767.

23 Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007).

24 Jon Bailes and Cihan Aksan, *Weapon of the Strong: Conversations on US State Terrorism* (Pluto Press 2012) 23 vd.

simultaneously containing the potential to protect the rights of the weak and vulnerable. Consequently, this dichotomy has profound implications for the conception of human rights as a subset of international law. Despite its inherent flaws, this cycling effect, does not diminish the significance of human rights in the collective consciousness. Instead, it serves to continually reinforce and reinvigorate the discourse surrounding human rights, highlighting the ongoing struggle to reconcile lofty ideals with geopolitical realities.

To sum, the balancing effect, the gap between theory and practice due to lack of capacity and the nature of the international law pave the way for illusion of "end" issue.

WHAT HISTORY SHOWS

Understanding the history of human rights is essential for gaining insights into its future trajectory. The history of human rights proves that progress in human rights has been made by political decisions which are *critical junctures* and court's decisions and efforts of institutions -mostly NGO's working on human rights- which are *incremental changes*.

Historical analysis allows us to identify patterns, trends, and critical junctures that have shaped the evolution of human rights discourse and practice. Importantly, it provides a foundation upon which we can assess the potential for further strengthening of human rights, particularly in light of historical tendencies and emerging technological advancements.

Throughout history, progress in human rights issues has often been driven by a combination of political decisions, judicial rulings, and the tireless efforts of various institutions, including non-governmental organizations (NGOs) dedicated to human rights advocacy. These critical junctures, marked by significant events such as the adoption of landmark declarations and conventions, have catalyzed advancements in the protection and promotion of human rights. For example, the Universal Declaration of Human Rights adopted by the United Nations in 1948 represented a pivotal moment in the international recognition of human rights principles.

Moreover, court decisions, both at national and international levels, have played a crucial role in interpreting and enforcing human rights standards. Landmark rulings by international tribunals, such as the European Court of Human Rights and the Inter-American Court of Human Rights, have set important precedents and expanded the scope of human rights protections.

In addition to political and judicial developments, the contributions of NGOs and civil society actors cannot be overstated. These organizations have been instrumental in advocating for human rights reforms, raising awareness, and holding governments and other actors accountable for human rights violations.

Their incremental efforts have often complemented and reinforced the broader push for human rights advancement.

Looking ahead, new technological developments present both opportunities and challenges for the future of human rights. The increasing interconnectedness facilitated by digital technologies has enabled greater access to information, enhanced communication channels, and empowered grassroots movements. However, it has also raised concerns about privacy, surveillance, and the weaponization of information.

In conclusion, the history of human rights underscores the importance of political decisions, judicial rulings, and civil society activism in driving progress in this field. While historical tendencies suggest a trajectory towards further strengthening of human rights, the evolving landscape of technology introduces new complexities that will require careful navigation. Ultimately, the future of human rights will depend on the collective efforts of governments, institutions, and individuals to uphold the principles of dignity, equality, and justice for all.

A. Political Decisions as Critical Junctures

The references made to the "human rights" in legal texts are quite new phenomenon. It appears in early legal writings about minorities in the 1920's.[25] But the main impetus was the adoption of UN Charter which set "protection of human rights" among its aims. Then non-binding UN Human Rights Declaration was adopted in General Assembly. This document was characterized "as a common standard of achievement for all peoples and all nations."[26] Also it paves the way for two different treaties which are binding; Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights.

Beyond those legal instruments and the commitments, three major developments led to the rise of human rights and respect for the provisions of the Declaration of Human Rights according to Richard Falk; the role of NGO's, USA activism as supporting human rights and the influence of human rights in collapse of racist regime in South Africa.[27] The activisms of human rights nongovernmental organizations (NGOs) are critical. NGOs such as Red Cross, Amnesty International, and Oxfam etc. have been important participants in human rights campaigns. This can be seen as an emergence of an influential pressure groups engaging in human rights which lead for change in society. The source of their activism is simple, human rights NGOs are using legal or political commitments of the governments made under international treaties as

25 Costas Douzinas, *The End of Human Rights* (n 11) Chapter 1.

26 United Nations, 'Universal Declaration of Human Rights' (*United Nations*) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 14 March 2024.

27 Bailes and Aksan (n 24) 27.

a tool. Human rights advocates in different regions of the world are working with governments in preparing the required reports to the UN treaty monitoring bodies[28] and where necessary preparing parallel or alternative reports. Furthermore, local legal, political initiatives and campaigns are effective than international treaties, committees and reports. NGOs are able to mobilize public opinion for the promotion of human rights.

Second development was the US 'discovery' of human rights during the Carter presidency in the late 1970's as part of an effort to restore America's moral reputation after its humiliating experiences in the Vietnam War.[29] One of the NGO officials wrote for illustrating how this affects the existing situation on these years, "human rights are suddenly chic. For years we were preachers, idealists, busybodies and now we are respectable".[30]

Thirdly, perhaps most important of all, "human rights allowed the global anti-apartheid campaign to become a political project that contributed to the collapse of the racist regime in South Africa"[31] through 90's. Similarly, some of the scholars argue that Soviet Union actually was collapsed after signing the Helsinki Accord: Declaration on Human Rights in 1975.[32]

To sum, with various political developments or the enthusiasm of politicians towards human rights at various times promoted the human rights issue and create critical junctures. It is like a wave which has ebb and flux.

B. Judicial Protections as Incremental Changes

Courts, quasi-courts or committees given judicial review caused a significant impetus on protection of human rights globally, regionally and nationally. In fact,

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28 The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. Each State party to a treaty has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty. There are ten human rights treaty bodies composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed renewable terms of four years by State parties. These bodies are: Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED) 'Treaty Bodies' (*OHCHR*) <https://www.ohchr.org/en/treaty-bodies> accessed 14 March 2024.

29 Bailes and Aksan (n 24) 13 vd.

30 Kenneth Cmiel, 'The Emergence of Human Rights Politics in the United States' (1999) 86 Journal of American History 1231, 1248.

31 Bailes and Aksan (n 24) 53.

32 Robert D English, *Russia and the Idea of the West: Gorbachev, Intellectuals, and the End of the Cold War* (Columbia University Press 2000) 154–155.

not only for protection but also for closing the gap between theory and practice, they played an important role. Their unique function brings about progressive incremental changes. They set scope of the rights or their boundaries case-by-case basis and in many times extend the scope of the rights. On the contrary to critical junctures, these changes displayed incremental adjustments rather than groundbreaking action.

Firstly, there is binding UN treaties, and every treaty has a committee. Those committees give judicial review on the basis of individual application or reporting system. There is also "follow up procedure" which means monitoring the states after giving decision whether it implement the decision.

Secondly, there are regional protection systems such as European, African and American. Interesting decision given by Inter-American Court of Human Rights in 2003 about the case of *Myrna Mack Chang v. Guatemala*[33] illustrate the level of protection. In final judgments part, court unanimously accepts: *State must remove all de facto and legal obstacles and mechanisms that maintain impunity; carry out a public act of acknowledgment of its responsibility in connection with the facts of this case and of amends to the memory of Myrna Mack Chang; must publicly honor the memory of José Mérida Escobar; must include, in the training courses for members of the armed forces and the police, as well as the security agencies, education regarding human rights and International Humanitarian Law; must establish a scholarship, in the name of Myrna Mack Chang; must name a well-known street or square in Guatemala City after Myrna Mack Chang.* Court also ordered the state to pay compensation for pecuniary *and non-pecuniary damages.*[34] Most importantly, Court ordered that it will monitor compliance with this judgment and will close the instant case once the state has fully complied with its provisions. Within one year of notification of this judgment, the state must submit to the Court a report on the measures adopted to comply with it.

The most effective regional system of implementation is under the European Convention on Human Rights (ECHR). Convention protects main civil and political rights.[35] Under ECHR, aggrieved Europeans, after exhausting the remedies offered in their national legal systems can submit an application to the

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33 *Case of Myrna Mack Chang v Guatemala, Hernández Mack and ors (on behalf of Mack Chang) v Guatemala* [2003] IACHR Series C No 101 (Inter-American Court of Human Rights [IACtHR]).

34 ibid 134–137.

35 For comprehensive analysis in protection of social rights by European Court of Human Rights and European Court of Justice see: Oğuz Kaan Pehlivan, Avrupa İnsan Hakları Mahkemesi ve Avrupa Adalet Divanı Kararları Işığında Sosyo-Ekonomik Hakların Korunması in Kıvılcım Ertan Akkoyunlu, Filiz Kartal and Yeliz Şanlı Atay (eds), *Sosyal Adalet için İnsan Hakları: Sosyal Haklar* (Türkiye ve Orta Doğu Amme İdaresi Enstitüsü (TODAİE) 2014).

European Court alleging that their rights have been violated by actions of their state. Court conducts a full judicial investigation of the claim during which the citizen plaintiff is put on an equal footing with the defendant state. At the end of the process, the state is obliged to comply with any adverse findings of the Court. For example, Britain has changed its law on telephone tapping[36] contempt of court and the treatment of transsexuals[37]; Germany gave non-German speaking defendants the right to an interpreter[38], Australia abolished state monopoly on cable and satellite televisions regarding freedom of expression[39] etc.[40]

The Council of Europe saw significant growth in the 1980s and 1990s, resulting in a substantial increase in the workload of its Convention institutions. In 1981, the Commission dealt with 404 applications, but in 1997, it handled 4,750 applications. Similarly, the Court heard 7 cases in 1981, but this number rose to 119 cases in 1997. In 1998, the part-time Court was substituted by a full-time entity. According to the courts' official statistics, "more than 91% of the Court's judgments since its creation in 1959 have been delivered between 1998 and 2011"[41]. Between 1959-1998 only 837 judgments, in 2002 888 judgments were delivered. Between years 1998-2011 is the decade which "end" or "crisis literature" was occurred. That seems contradictory. The appropriate explanation for this can be found in contribution of technology in human rights. "Internet and mobile networks are spreading, human rights groups are using satellite images and other large scale, centralized technology as well to detect and document human rights abuses."[42] Thus, there are too many violations, but governments have lack of capacity to cope, also measures taken for limiting human rights and transparency created the perception of "end".

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36 *Malone v the United Kingdom (just satisfaction)* [1985] ECtHR 8691/79; *Khan v the United Kingdom* [2000] ECtHR 35394/97.

37 *Z and Others v the United Kingdom* [2001] ECtHR [GC] 29392/95; *Christine Goodwin v the United Kingdom* [2002] ECtHR [GC] 60596/09.

38 *Luedicke, Belkacem and Koç v Germany* [1978] ECtHR 6210/73, 6877/75, 7132/75.

39 *Lingens v Austria* [1986] ECtHR 41193/15, 51044/15, 53856/15, 1724/16, 2809/16, 8141/16, 16976/16, 18306/16, 43625/16, 46334/16, 46376/16, 56677/16, 57523/16, 59609/16, 76672/16, 77512/16, 77526/16; *Informationsverein Lentia and Others v Austria* [1993] ECtHR 24753/13, 28610/13, 57854/13, 65553/13.

40 For other examples see 'Annual Reports - ECHR - ECHR / CEDH' (*ECHR*) <https://www.echr.coe.int/annual-reports> accessed 14 March 2024.

41 'Human Rights - All You Need to Know' (*Politics.co.uk*) <https://www.politics.co.uk/reference/human-rights/> accessed 14 March 2024; 'Statistics - ECHR - ECHR - ECHR / CEDH' (*ECHR*) <https://www.echr.coe.int/statistical-reports> accessed 14 March 2024.

42 Josh Calder, 'Who Will Be Free? The Battles for Human Rights to 2050' [2012] The Futurist 29, 30.

Moreover, judgment ruled by European Court of Justice (ECJ) in Kadi case[43] is a significant example for broadening the scope of human rights protection in Europe. Mrs. Kadi applied to Court of First Instance for annulment of decision taken by EU authorities in accordance with the Council Regulation 881/2002[44] which had imposed restrictive measures against persons and entities associated with the Al-Qaeda and the Taliban. Although the Court of First Instance has refused the application, ECJ overruled the judgment on the basis of violation of right to defence and right to be heard. Court ruled that measures incompatible with respect for human rights are not acceptable in the EU. "Even though the ECJ emphasized that it had no authority to call into question the lawfulness of UN Security Council resolutions, this judgment leaves a wide range of interpretations regarding the interplay between international law and EU law."[45] This judgment is unique because, ECJ ignored the Security Council resolutions and the resolution enacted by EU on the basis of violation of human rights.

For concluding remarks, judicial protection gave momentum in protection of human rights internationally or regionally. Judgments and the follow up procedure help effectively implementation of rights and obligations in domestic legal systems. This gradually strengthens the legal position of human rights and creates an incremental change.

CONCLUSION

The landscape of human rights is under threat not from overt assaults but from a gradual erosion through isolated incidents and normalized practices, as noted by scholars worldwide. Incidents such as bomb attacks, civil wars, and post-9/11 security measures resembling enemy criminal law policies have posed challenges to basic rights like the right to life and liberty, exemplified by violations in places like Guantanamo and Abu Ghraib. This has led to a shift in the balance between rights and security, raising concerns about the survival of human rights in a changing political landscape.

Surveillance technologies and the rise of authoritarian leaders further compound these challenges, blurring lines between security measures and privacy rights.

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43 Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities) European Court of Justice, Joined cases C-402/05 P and C-415/05 P, 03/09/2008.

44 Imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, Council Regulation (EC) No 881/2002, 29/05/2002, Official Journal L 139.

45 Gabor Halmai, *Perspectives on Global Constitutionalism: The Use of Foreign and International Law* (Eleven International Publishing 2014) 255.

Minority and marginalized groups suffer disproportionately from weakening human rights standards, evidenced by discriminatory policies and systematic persecution. However, mechanisms like the United Nations Human Rights Council and regional courts offer avenues for accountability.

The post-9/11 era has sparked debates about the legitimacy of measures like torture and preventive detention, with scholars like Michael Ignatieff suggesting the "end of human rights" in light of security concerns. Yet, historical trends and ongoing advancements in technology suggest otherwise. Human rights have evolved through critical junctures driven by political decisions, judicial protections, and the activism of NGOs, leading to incremental changes and broadening of protections.

Despite challenges such as the gap between rhetoric and reality and the nature of international law, human rights continue to be a vital global concern. Judicial protections at the international and regional levels have played a significant role in expanding rights and ensuring accountability. The history of human rights suggests a trajectory of progress rather than decline, driven by political actions, court decisions, and incremental changes. As such, the idea of the "end of human rights" remains contested and contradicted by historical trends and ongoing efforts to uphold these fundamental principles.

Ongoing debate about the end of the human rights and its future actually is an illusion. There are reasonable factors creating such kind of an illusion. First, different understanding of human rights contemporarily compels us to set limits and define the scope of rights and obligation which is I preferred to name "balancing effect". Also "observance of human rights has improved almost universally over the last 50 years, even in authoritarian countries."[46] Such transparency makes more visible the human rights violations all over the world. There is also lack adequate capacity or unwillingness of the governments for implementation. Thus, both reasons again strengthen that illusion.

The developing history of human rights indicated a different reality. The scope of protection is becoming wider and wider on the basis of political decisions from time to time and judicial review by gradually. Political decisions create critical junctures and judgments create incremental changes. Both contribute implementation and protection of human rights regionally or domestically.

[46] Calder (n 43) 31.

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ARBITRATION IN INDIVIDUAL LABOR DISPUTES[*]

Bireysel İş Uyuşmazlıklarında Tahkim

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Abstract

Individual labor disputes need to be resolved quickly, enabling employees in economically weaker positions to access their rights promptly within the employment relationship. Delays in resolving labor disputes due to the high workload of courts increase the importance of alternative dispute resolution methods. Arbitration, one of these methods, is regulated in a limited manner for individual labor disputes. It is acknowledged that arbitration can only be resorted to for claims limited to the invalidity of termination. However, it is accepted that an arbitration agreement can be made during the period when the employer's authority over the employee and the employee's dependency on the employer are eliminated. Therefore, a valid arbitration agreement can only be made after the termination of the employment contract. In this case, arbitration can only be resorted to in a very limited manner. At this point, sufficient efficiency and benefit are not achieved through arbitration. To ensure the quick resolution of labor disputes without allowing the parties to abuse the process and without harming their rights, arbitration under the supervision and authority of an institutional structure can be effectively implemented.

Keywords: Labor Dispute, Arbitration, Alternative Dispute Resolution, Suitability for Arbitration

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

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Özet

Bireysel iş uyuşmazlıklarının hızlı şekilde çözümlenmesi, iş ilişkisinde ekonomik bakımdan zayıf konumda olan işçinin haklarına kısa sürede ulaşması bakımından önem arz eder. Mahkemelerin iş yükünün fazla olması nedeniyle iş uyuşmazlıklarının çözülmesinde yaşanan gecikmeler, mahkeme dışı çözüm yollarının önemini artırmaktadır. Bu yollardan biri olan tahkim, bireysel iş uyuşmazlıkları bakımından sınırlı şekilde düzenlenmiştir. Yalnızca feshin geçersizliğine yönelik talepler ile sınırlı olmak üzere tahkim yoluna başvurulabileceği kabul edilmektedir. Bununla beraber işverenin işçi üzerindeki otoritesinin ve işçinin işverene bağımlılığının ortadan kalktığı kabul edilen dönemde tahkim sözleşmesi yapılabileceği kabul edilmektedir. Buna göre ancak iş sözleşmesinin sona ermesinden sonra geçerli bir tahkim sözleşmesi yapılabilir. Bu durumda oldukça sınırlı şekilde tahkim yoluna başvurulabilmektedir. Gelinen noktada, tahkimden yeterli verim ve fayda sağlanamamaktadır. Taraflara kötüye kullanma imkânı tanımadan, tarafların hakları zarar görmeden iş uyuşmazlıklarının kısa sürede çözülmesini sağlamak üzere kurumsal bir yapının denetimi ve otoritesi altında tahkim yolu etkin şekilde uygulanabilir.

Anahtar Kelimeler: İş Uyuşmazlığı, Tahkim, Alternatif Çözüm Yöntemi, Tahkime Elverişlilik

Introduction

Disputes that arise between parties are primarily resolved in state-established courts. However, alternative dispute resolution methods exist alongside court litigation. These alternative methods offer various advantages when effectively employed in resolving disputes compared to traditional court proceedings. Therefore, parties may prefer resorting to these methods to settle their disputes. One such method is "arbitration". In certain cases, concerning private law disputes, arbitration provides the opportunity for resolution through private arbitrators instead of courts[1]. Advantages such as shorter process duration, fewer procedural formalities, the presence of expert arbitrators, and emphasis on confidentiality make arbitration an appealing option compared to court litigation[2].

The rapidly increasing number of employment disputes is leading to a continuous escalation of the already heavy workload of employment courts. This situation poses a significant obstacle to the timely resolution of disputes. To alleviate the burden on courts, mediation has been introduced as a prerequisite

1 Hakan Pekcanıtez and Ali Yeşilırmak, *Medenî Usûl Hukuku Cilt III* (15th edn On İki Levha 2017) 2594; Hakan Pekcanıtez, Oğuz Atalay and Muhammet Özekes *Medenî Usûl Hukuku* (11th edn On İki Levha 2023) 613

2 Pekcanıtez and Yeşilırmak (n 1) 2603,2604; Nuray Ekşi *Hukuk Muhakemeleri Kanunu'nda Tahkim* (2nd edn Beta 2019) 12; İbrahim Özbay and Yavuz Korucu *Hukuk Muhakemeleri Kanunu Çerçevesinde Tahkim* (Adalet 2016) 26 vd.

for litigation in employment disputes. However, due to the low settlement rates during mandatory mediation, disputes continue to reach the courts, thus rendering mediation ineffective in reducing the workload of the courts. Therefore, it is crucial for parties in employment disputes to consider alternative dispute resolution methods by their own volition.

Article 20 of Labor Law No. 4857[3] regulates the possibility for parties, both employees and employers, to resort to arbitration, in addition to court litigation, limited to reinstatement cases in individual employment disputes. The Supreme Court (*Yargıtay*) has ruled that arbitration agreements made after the termination of an employment contract can only be applied to individual employment disputes related to job security. The limitation of arbitration as provided in the law, both in terms of the subject matter of disputes and the timing of agreements, has sparked debates in legal doctrine regarding its appropriateness in reducing the workload of the courts.

This study first briefly examines the concept of arbitration, types of arbitration, arbitration agreements, and the suitability for arbitration. Subsequently, it discusses the types of employment disputes, the regulation of arbitration in individual employment disputes, the suitability of resolving these disputes through arbitration, and evaluates arbitration agreements in individual employment disputes, as well as mandatory arbitration in employment contracts. Finally, the study investigates the practices of Consumer Arbitration Boards and Insurance Arbitration Committees, which could serve as examples for establishing a framework for arbitration in individual employment disputes.

I. ARBITRATION IN GENERAL

A. CONCEPT OF ARBITRATION

Arbitration is the resolution of disputes between parties through private arbitrators instead of courts, facilitated by an arbitration agreement[4]. It entails impartial and independent arbitrators making final and binding decisions on existing or potential disputes arising from contractual or non-contractual private law relationships, which parties can resolve by their own free will[5].

Article 412/1 of Civil Procedure Law No. 6100[6] and Article 4/1 of International

[3] Official Gazette of the Republic of Turkey 10.06.2003/25134

[4] Baki Kuru *Hukuk Muhakemeleri Usulü Cilt 6* (6th edn Demir Demir 2001) 5875; Pekcanıtez and Yeşilırmak (n 1) 2593; Pekcanıtez, Atalay and Özekes (n 1) 613; Murat Atalı, İbrahim Ermenek and Ersin Erdoğan, *Medenî Usûl Hukuku* (6th edn Yetkin 2023) 735; Vahit Doğan *Milletlerarası Özel Hukuk* (7th edn Savaş 2021) 165

[5] Kuru (n 4) 5875; Atalı, Ermenek and Erdoğan (n 4) 735; Özbay and Korucu (n 2) 3; M Serdar Özbek *Alternatif Uyuşmazlık Çözümü* (3rd edn Yetkin 2013) 119

[6] Official Gazette of the Republic of Turkey 04.02.2011/27835

Arbitration Law No. 4686[7] define arbitration in a similar manner. According to these provisions, arbitration is a method whereby parties agree to submit all or part of their disputes arising from a contractual or non-contractual legal relationship, existing or potential, to an arbitrator or arbitral tribunal for resolution. Decisions rendered at the conclusion of the arbitration process constitute final judgments and are enforceable, akin to court judgments[8].

The legal nature of arbitration is a subject of debate in legal doctrine, concerning whether it constitutes an alternative dispute resolution method or a judicial dispute resolution mechanism. According to one viewpoint, arbitration constitutes a distinct judicial activity wherein private law disputes are adjudicated by independent and impartial arbitrators[9]. This adjudicatory process is subject to oversight by the state[10]. The role of arbitrators is to adjudicate disputes arising from substantive legal relationships between parties in a manner like courts[11]. Despite being a method conducted outside the realm of state judiciary, arbitration differs from other alternative dispute resolution methods such as non-binding mediation and conciliation due to the arbitrators' authority to render final and binding decisions, making it a distinct avenue of independent adjudication outside of alternative dispute resolution mechanisms[12].

According to another viewpoint, arbitration is considered an alternative dispute resolution method distinct from judicial proceedings[13]. In this perspective, arbitration should be recognized as an alternative dispute resolution method since it typically operates based on the parties' choice and their voluntary engagement, differing from court litigation[14].

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7 Official Gazette of the Republic of Turkey 05.07.2001/24453

8 Pekcanıtez and Yeşilırmak (n 1) 2594; For detailed information on the finality effect of arbitration decisions, see. Ersin Erdoğan, *Hakem Kararlarının Kesin Hüküm Etkisi* (Yetkin 2017)

9 Pekcanıtez and Yeşilırmak (n 1) 2593; Cemal Şanlı, Emre Esen and İnci Ataman Figanmeşe *Milletlerarası Özel Hukuk* (8th edn Beta 2020) 674; Atalı, Ermenek and Erdoğan (n 4) 735; Özbay and Korucu (n 2) 17

10 Pekcanıtez and Yeşilırmak (n 1) 2594; Atalı, Ermenek and Erdoğan (n 4) 735

11 Süha Tanrıver 'Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk' (2006) (64) Türkiye Barolar Birliği Dergisi 171; Ramazan Arslan, Ejder Yılmaz, Sema Taşpınar Ayvaz and Emel Hanağası, *Medenî Usul Hukuku* (9th edn Yetkin 2023) 820

12 Resul Kurt, 'İş Yargısında Arabuluculuk' (2018) 135 Türkiye Barolar Birliği Dergisi 412; Atalı, Ermenek and Erdoğan (n 4) 735; Erkan Küçükgüngör 'Spor Hukuku Uyuşmazlıklarında Tahkim ve Alternatif Çözüm Yöntemleri' (2004) 22 (4) Banka ve Ticaret Hukuku Dergisi 48

13 Özbek (n 5) 119; Zeynep Şişli 'Bireysel İş Uyuşmazlıkları ve Yargısal Çözüm' (2012) (2) Ankara Barosu Dergisi 57; Aydın, Buğra 'Bireysel İş Uyuşmazlıkları ve Tahkim' (2015) Mehmet Akif Aydın'a Armağan 840

14 Asiye Şahin Emir, 'İş Sözleşmesinde Yer Alan Tahkim (Özel Hakem) Şartının Geçerlilik Sorunu' (2020) 22 (2) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 908

B. TYPES OF ARBITRATION

Arbitration is subject to classification based on certain characteristics. Essentially, arbitration is a process initiated by the agreement of parties to resolve their disputes through this method[15]. When parties decide to resolve disputes through arbitration instead of court litigation for matters subject to their free will, it constitutes "*voluntary arbitration*"[16]. Conversely, "*mandatory arbitration*" arises when resorting to arbitration is a legal requirement, barring parties from initiating court proceedings[17]. For instance, in employment disputes, Law No. 6356 on Trade Unions and Collective Labor Agreements[18] may mandate arbitration for collective interest disputes, empowering the High Arbitration Board.

The distinction between institutional and ad hoc arbitration does not hinge on whether the process is administered by a specific institution or according to procedural rules. Institutional arbitration refers to proceedings conducted under the rules and oversight of a designated institution, with secretarial support[19], such as ISTAC (Istanbul Arbitration Centre), ITOTAM (Istanbul Chamber of Commerce Arbitration and Mediation Centre), ICC (International Chamber of Commerce), and ICSID (International Centre for Settlement of Investment Disputes). Conversely, ad hoc arbitration occurs when a temporary arbitral tribunal, formed by the parties without selecting an arbitration institution, administers the process[20], which may offer advantages in terms of confidentiality despite requiring more cooperation between the parties[21].

Arbitration is also classified based on the presence or absence of a foreign element. If arbitration does not involve any foreign element, it is referred to as domestic arbitration. Provisions governing domestic arbitration are outlined between Articles 407 and 444 of Law No. 6100 on Civil Procedure. On the other hand, if arbitration involves a foreign element, it is termed as international arbitration[22]. The foreign element is determined based on factors connecting a legal relationship or event with multiple legal systems, typically identified from

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15 Arslan, Yılmaz, Taşpınar Ayvaz and Hanağası (n 11) 820

16 Kuru (n 4) 5918; Pekcanıtez and Yeşilırmak (n 1) 2613; Süha Tanrıver, *Medenî Usûl Hukuku Cilt II* (Yetkin 2021) 335; Özbay and Korucu (n 2) 18

17 Kuru (n 4) 5876; Tanrıver, Usul Hukuku (n 16) 334; Arslan, Yılmaz, Taşpınar Ayvaz and Hanağası (n 11) 820; Özbay and Korucu (n 2) 18

18 Official Gazette of the Republic of Turkey 07.11.2012/28460

19 Pekcanıtez and Yeşilırmak (n 1) 2612; Tanrıver, Usul Hukuku (n 16) 337; Şanlı, Esen and Ataman Figanmeşe (n 9) 679; Ziya Akıncı, *Milletlerarası Tahkim* (5th edn Vedat 2020) 6; Doğan (n 4) 166; Özbay and Korucu (n 2) 23

20 Pekcanıtez and Yeşilırmak (n 1) 2612; Tanrıver, Usul Hukuku (n 16) 338; Şanlı, Esen and Ataman Figanmeşe (n 9) 678; Doğan (n 4) 166; Özbay and Korucu (n 2) 21

21 Pekcanıtez and Yeşilırmak (n 1) 2612

22 Akıncı (n 19) 74; Tanrıver, Usul Hukuku (n 16) 341; Özbay and Korucu (n 2) 20

elements related to the essence of the dispute. Factors such as the parties' places of residence, locations of their workplaces, the place of arbitration, the place of performance, the place most closely associated with the contract, the presence of foreign capital or foreign credit, and international movement of goods and capital are considered in determining the foreign element[23]. In disputes involving a foreign element where Turkey is designated as the place of arbitration or where the provisions are selected by the parties or the arbitral tribunal, Law No. 4686 on International Arbitration is applicable (Article 1 of Law No. 4686).

C. ARBITRATION AGREEMENT

The foundation of the arbitration procedure lies in the arbitration agreement entered by the parties' free will, whereby they opt for the resolution of their dispute by private arbitrators instead of state judiciary[24]. The arbitration agreement, also known as an arbitration clause, is a pact between the parties to submit all or part of their existing or potential disputes arising from a contractual or non-contractual legal relationship to an arbitrator or arbitral tribunal (Article 412/1 of Law No. 6100 on Civil Procedure, Article 4/1 of Law No. 4686 on International Arbitration). The arbitration agreement can be incorporated into the main contract by including an arbitration clause or can be concluded separately (Article 4/1 of Law No. 4686 on International Arbitration).

The arbitration agreement or clause must be in writing[25]. With advancements in communication technologies, the written form requirement has been flexibly adapted to include electronic agreements, which are deemed valid. Consequently, the arbitration agreement can be concluded through communication means or electronic platforms between the parties. Moreover, the absence of objection from the defendant regarding the existence of a written arbitration agreement asserted in the statement of claim is considered sufficient proof of the existence of the arbitration agreement. Additionally, referring to a document containing an arbitration clause to incorporate it as part of the main contract also constitutes the conclusion of an arbitration agreement (Article 412/3 of Law No. 6100, Article 4/2 of Law No. 4686).

Parties may agree to resort to arbitration either before or after the emergence of a dispute[26]. For a valid arbitration agreement to exist, there must be a clear

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23 Akıncı (n 19) 74

24 Pekcanıtez and Yeşilırmak (n 1) 2594; Akıncı (n 19) 126; Şanlı, Esen and Ataman Figanmeşe (n 9) 675; Sibel Özel, *Milletlerarası Ticari Tahkimde Kanunlar İhtilafı Meseleleri* (Legal 2008) 31

25 For detailed information on the requirement of written form, see. Banu Şit 'Tahkim Anlaşmasının Şekli: Yazılı Şekil Şartı ve İnternet Aracılığı ile Akdedilen Tahkim Anlaşmaları' (2005) 25 (1-2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 411-436

26 Akıncı (n 19) 133; Ekşi (n 2) 72

and unequivocal expression of the parties' intention to submit to arbitration. The parties' intention to resort to arbitration must be unequivocal, leaving no room for doubt[27]. Therefore, the arbitration agreement has a negative effect on the parties' ability to resort to court[28].

Since arbitration is generally based on the parties' free will, they can freely determine the procedural rules applicable to the arbitration agreement, the substantive legal rules applicable to the essence of the dispute, the number of arbitrators (Article 415 of Law No. 6100 on Civil Procedure), their qualifications, the method of appointment (Article 416/1), their powers, the place of arbitration (Article 425/1), the language of proceedings, and the system of evidence, including procedural matters (Article 424)[29].

D. SUITABILITY FOR ARBITRATION

For a dispute to be resolved through arbitration, it must be suitable for arbitration. Article 408 of Law No. 6100 on Civil Procedure stipulates that disputes over real rights on immovable properties and disputes arising from matters not subject to the parties' will are not suitable for arbitration. Likewise, Article 1/4 of Law No. 4686 on International Arbitration provides that this law shall not apply to disputes concerning real rights on immovable properties located in Turkey and disputes not subject to the parties' will[30]. According to

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27 Akıncı (n 19) 152; Ekşi (n 2) 72; Atalı, Ermenek and Erdoğan (n 4) 741. In a decision rendered by the 6th Civil Chamber of the Court of Cassation, it was ruled that the provision included in the contract between the parties stating that *'Any dispute related to the contract that cannot be resolved by reconciliation or any dispute arising from the contract can be finally resolved through arbitration or judicial means after the temporary acceptance of a panel of three arbitrators appointed as indicated below...' is not compatible with the exclusive acceptance of the arbitration board for the resolution of the dispute, as the decision on the selection of arbitration or judicial means will be made by the employer, and the provision stating* '... the decision on the selection of arbitration or judicial means will be made by the employer,' grants one of the parties the authority to file a lawsuit in court, therefore the arbitration intention is not clear and definitive, thus the arbitration clause is deemed invalid (Court of Cassation 6th Civil Chamber 2022/3703, 2023/1043, 14.03.2023, Lexpera l.a.d.18.01.2023). In a case subject to a decision by the 15th Civil Chamber of Istanbul Regional Court of Justice, the arbitration clause was accepted for disputes arising from a contract for construction in exchange for land share, while in a subsequent separate contract dated later, it was agreed that Istanbul Courts and Enforcement Offices would have jurisdiction over disputes arising from the interpretation and application of this contract in a provision titled 'dispute.' Since both contracts relate to the same immovable property, it was stated in the decision that the contracts should be interpreted together, and as the arbitration intention was not clear and definitive, it was concluded that the arbitration clause is invalid (Istanbul Regional Court of Justice 15th Civil Chamber 1740/1330, 18.10.2018, Lexpera l.a.d.18.01.2023)

28 Pekcanıtez and Yeşilırmak (n 1) 2598

29 Şanlı, Esen and Ataman Figanmeşe (n 9) 674

30 Besides the relevant provisions of the Turkish Civil Procedure Code and the Turkish Code of

these provisions, disputes arising from real rights on immovable properties are not suitable for resolution through arbitration. Arbitration may only be initiated for matters subject to the parties' will, where parties can freely reach agreements, reconcile[31], and if such agreement is deemed valid without the need for a court decision, resorting to arbitration for such disputes is possible[32].

The unsuitability of a dispute for arbitration may lead to the annulment of arbitral awards (Article 439 of Law No. 6100, Article 15 of Law No. 4686) or the refusal of enforcement of foreign arbitral awards under Article 54 of Law No. 5718 on International Private Law and Procedure[33].

Certain disputes, although not expressly prohibited by law, are considered unsuitable for arbitration due to the presence of a superior interest that must be protected, even if they are subject to the parties' will. For instance, cautious consideration is given to resorting to arbitration for the resolution of individual employment disputes in accordance with the principle of protecting the rights of employees[34].

II. INDIVIDUAL EMPLOYMENT DISPUTES RESOLUTION THROUGH ARBITRATION

A. AN OVERVIEW OF EMPLOYMENT DISPUTES

The arbitration route for resolving employment disputes should be evaluated separately based on the nature of the dispute. Different methods have been envisaged for resolving these disputes, which are classified based on the parties involved and the subject matter of the dispute[35].

The distinction between individual and collective employment disputes is based on the parties involved. Disputes arising solely from individual employment relationships between an employee and an employer are termed as individual employment disputes[36]. Examples of such disputes include claims by employees

Obligations, various other laws also contain provisions stating that certain disputes are not suitable for arbitration. Article 262 of Law No. 6098, the Turkish Code of Obligations, stipulates that arbitration agreements cannot be made regarding disputes arising from installment sales contracts. Similarly, Article 1271/1 of Law No. 6102, the Turkish Commercial Code, regulates that arbitration agreements made before the claim for compensation for damage to the passenger or cargo in maritime transport contracts shall not be valid.

31 Kuru (n 4) 5945; Pekcanıtez and Yeşilırmak (n 1) 2631

32 Kuru (n 4) 5946

33 Official Gazette of the Republic of Turkey 12.12.2007/26728

34 Pekcanıtez and Yeşilırmak (n 1) 2632.

35 Melda Sur, *İş Hukuku Toplu İlişkiler* (10th edn Turhan 2022) 409

36 Nuri Çelik, Nurşen Caniklioğlu, Talat Canbolat and Ercüment Özkaraca, *İş Hukuku Dersleri* (35th edn Beta 2022) 1049; Aziz Can Tuncay, Burcu Savaş Kutsal and Yeliz Bozkurt

for wages, severance pay, reinstatement, annual leave, among others. Disputes involving at least one party being a group, such as a labor union, an employer union, or an employer who is not a member of a union, are referred to as collective employment disputes[37]. These disputes can arise during the process of negotiating a collective labor agreement or after its conclusion. Additionally, the involvement of a union in a dispute arising from an individual employment relationship can also classify it as a collective employment dispute. In collective employment disputes, at least one party represents a group[38].

The distinction between rights-interest disputes is based on the subject matter of the employment dispute. Disputes arising from the violation of rights provided by legislation, employment contracts, and collective labor agreements are categorized as rights disputes[39]. On the other hand, disputes arising from the determination of future rules, interests, rights, and obligations of the parties fall under interest disputes[40]. Individual employment disputes always arise as rights disputes, whereas collective employment disputes can be rights disputes or interest disputes[41].

In the resolution of individual employment disputes, optional arbitration is provided for the employee's reinstatement request against the termination of the employment contract under Article 20 of Law No. 4857 on Labor. Regarding the resolution of collective employment disputes, both optional and mandatory arbitration provisions have been made. Article 52 of Law No. 6356 on Trade Unions and Collective Labor Agreements regulates that parties can resort to a private arbitrator by mutual agreement at any stage of collective rights or interest disputes. In this case, optional arbitration applies, and unless otherwise agreed, the provisions of Law No. 6100 on Civil Procedure regarding private arbitrators are applied. While the default resolution method for disputes arising during

Gümrükçüoğlu *Toplu İş Hukuku*, (8th edn Beta 2023) 380; Ömer Ekmekçi, *Toplu İş Hukuku Dersleri* (4th edn On İki Lehva 2022) 513; Fevzi Şahlanan, *Toplu İş Hukuku* (On İki Levha 2020) 511; Sur (n 35) 409; Muhammed Fatih Uşan and Canan Erdoğan, *İş ve Sosyal Güvenlik Hukuku* (4th edn Seçkin 2023) 309

37 Çelik, Caniklioğlu, Canbolat and Özkaraca (n 36) 1049; Tuncay, Savaş Kutsal and Bozkurt Gümrükçüoğlu (n 36) 379; Ekmekçi, Toplu İş Hukuku (n 36) 513; Şahlanan (n 36) 511; Sur (n 35) 409; Uşan and Erdoğan (n 36) 310

38 Ekmekçi, Toplu İş Hukuku (n 36) 513

39 Çelik, Caniklioğlu, Canbolat and Özkaraca (n 36) 1048; Tuncay, Savaş Kutsal and Bozkurt Gümrükçüoğlu (n 36) 379; Ekmekçi, Toplu İş Hukuku (n 36) 514; Cevdet İlhan Günay, *İş ve Sosyal Güvenlik Hukuku Dersleri* (6th edn Yetkin 2020) 463; Sur (n 35) 410; Şahlanan (n 36) 510; Uşan and Erdoğan (n 36) 310

40 Çelik, Caniklioğlu, Canbolat and Özkaraca (n 36) 1048; Tuncay, Savaş Kutsal and Bozkurt Gümrükçüoğlu (n 36) 380; Ekmekçi, Toplu İş Hukuku (n 36) 514; Şahlanan (n 36) 510; Sur (n 35) 410; Uşan and Erdoğan (n 36) 310

41 Ekmekçi, Toplu İş Hukuku (n 36) 513; Günay, İş ve Sosyal Güvenlik (n 39) 463

the negotiation of a collective labor agreement is adversarial methods, there are instances where mandatory arbitration is stipulated. Mandatory arbitration stages are regulated in cases where the result of a strike vote is against striking, in cases where strikes and lockouts are prohibited, and in cases where strikes or lockouts are postponed by the President, with the High Arbitration Board being empowered. Failure to resort to mandatory arbitration in these cases leads to the loss of the authority of the labor union. The processes of optional and mandatory arbitration result in the emergence of a collective labor agreement (Article 52/3, Article 51/2 of Law No. 6356).

B. LEGAL REGULATION REGARDING ARBITRATION

With the enforcement of Law No. 4857 on Labor in 2003, a provision allowing recourse to private arbitration, namely arbitration, was introduced into our legal system, but only in the context of reinstatement lawsuits within the framework of job security provisions concerning individual employment disputes. According to Article 8 of the Convention concerning Termination of Employment at the Initiative of the Employer (No. 158), prepared by the International Labour Organization, and ratified by Turkey, titled "*Procedure for Challenging Termination*," "*A worker who believes that his employment has been terminated unfairly has the right to object before a court, labor court, arbitration board, or impartial arbitrator*". Accordingly, it is regulated that a worker whose employment contract is terminated unfairly has the right to object before an impartial authority such as a court, arbitrator, or arbitration board, and has the option to do so. Compliance with this Convention and, as stated in the rationale of Law No. 4857 on Labor, to reduce the workload of labor courts, the possibility of recourse to private arbitration has been provided for in the Law. However, recourse to arbitration is limited to reinstatement lawsuits only.

According to the first paragraph of Article 18 of Law No. 4857 on Labor, an employee with at least six months of seniority in workplaces with thirty or more employees is entitled to job security. When terminating the indefinite-term employment contract of an employee with job security, the employer must have a valid reason based on the employee's qualifications, conduct, or the requirements of the enterprise, workplace, or work. Thus, an employee whose employment contract is terminated in this manner must apply to a mediator within one month from the date of notification of the termination with the claim that no reason was given for the termination, or the reason given is not valid, according to the first paragraph of Article 20 of the Labor Law. If no agreement is reached during the mediation stage, a lawsuit can be filed in a labor court within two weeks from the date the final minutes are drawn up. If the parties agree, the dispute can also be referred to a private arbitrator within the same period instead of a labor court. As seen, arbitration in individual labor law is regulated only within

the framework of reinstatement lawsuits based on job security provisions, and optional arbitration has been arranged.

Before the Constitutional Court's annulment decision[42] dated October 19, 2005, the initial version of the provision was as follows: "*An employee whose employment contract is terminated may file a lawsuit in a labor court within one month from the date of notification of the termination, alleging that no reason was given for the termination, or the reason given is not valid. If there is a provision in the collective labor agreement or if the parties agree, the dispute is brought before a private arbitrator within the same period*.". Thus, according to the initial version of the provision, disputes regarding reinstatement could be resolved through a private arbitrator by including a provision in the collective labor agreement. The phrase "*If there is a provision in the collective labor agreement or if the parties agree*" was annulled by the Constitutional Court. In the reasoning of the annulment decision, it was stated that the provision allowing recourse to a private arbitrator in the collective labor agreement had a normative nature and bound union member employees, that according to Article 36/1 of the Constitution, everyone has the right to bring claims before judicial authorities and to fair trial by making use of legitimate means and methods, and that the provision subject to annulment gave the provisions related to private arbitration in the collective labor agreement the force of law, thus limiting the freedom to bring claims before judicial authorities. It was also emphasized that the inability to assert claims based on the merits before a court was a restriction of the right to seek justice and legal judicial protection, which was not compatible with the principles of a democratic society and proportionality, and therefore, it was found to be contrary to the Constitution.

The ruling stated that, regarding the provision stating, "*if the parties agree, the dispute shall be referred to arbitration within the same period*," the ability of the employee to reach an agreement with the employer regarding the referral of the dispute to arbitration solely rests on the employee's own volition. Therefore, it was argued that the employee, by exercising this volition, would be deemed to have waived the option to initiate legal proceedings, and thus, it was concluded that there is no violation of Article 36 of the Constitution, which guarantees the right to seek legal remedy. Consequently, the request for annulment on this basis was rejected.

At this point, within the framework of job security provided by Article 20, Paragraph 1 of Law No. 4857, it is possible for the parties to resolve disputes regarding reinstatement through arbitration agreements made at their own discretion and to resort to private arbitration.

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[42] Constitutional Court, 2003/66, 2005/72, 19.10.2005 (Official Gazette of the Republic of Turkey 24.11.2007/26710

C. ARBITRABILITY OF INDIVIDUAL EMPLOYMENT DISPUTES

There was no provision in the repealed Labor Law No. 1475 regarding the resolution of individual employment disputes through arbitration. During this period, the Supreme Court of Appeals ruled that arbitration could not be resorted to in the resolution of individual employment disputes, citing reasons such as the public policy nature of labor rights, the purpose of labor law to protect the weak against the strong, and the jurisdiction of labor courts in any dispute related to claims of rights between employees and employers[43]. With the enforcement of Law No. 4857 on Labor in 2003, it was stipulated that in disputes concerning reinstatement as regulated under Article 20 of the Law, parties could resort to a private arbitrator through an arbitration agreement made by their free will. Apart from this provision, there is no explicit prohibition in legal regulations regarding resorting to arbitration in the resolution of individual employment disputes. However, referring to a decision of the General Assembly of Civil Chambers of the Court of Cassation during the period of the old Law, the Court of Cassation also rules that arbitration agreements are not valid for disputes other than reinstatement lawsuits, due to the principle of interpretation in favor of the employee and the provisions concerning the jurisdiction of labor courts being of public policy nature[44]. According to a decision of the 9th Civil Chamber of the Court of Cassation in 2004, disputes arising from employment relationships are explicitly regulated to be resolved in labor courts, and except for disputes regarding the invalidity of termination, reinstatement, and related job security and idle time pay claims, there is no rule stating that other employment disputes can be resolved through a private arbitrator[45]. Therefore, it has been ruled that disputes other than those mentioned must be resolved in labor courts.

In another decision of the 9th Civil Chamber of the Court of Cassation, it was stated that a technical director, whose main duty is to provide directives and lead the team to success, is not considered an athlete and should be classified as

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43 Court of Cassation General Assembly, 9-643/1965/405, 10.11.1965

44 *"...The provisions regulating the jurisdiction of Labor Courts are considered as relating to public order, and it is clearly stated that arbitration agreements are not valid except in reinstatement cases."* Court of Cassation 9th Civil Chamber, 27326/32858, 05.11.2014, Legalbank, l.a.d.20.01.2024. *"The provisions regulating the jurisdiction of Labor Courts are considered as relating to public order, and it is clearly stated that arbitration agreements are not valid except in reinstatement cases; it is optional to make an arbitration agreement in reinstatement cases according to the first paragraph of Article 20 of Law No. 4857, and it is established practice that in case of agreement between the parties, the dispute can be resolved through arbitration; it is also established practice that the jurisdiction and authority of Labor Courts cannot be abolished by arbitration agreements."* Istanbul Regional Court of Justice 31st Civil Chamber, 2018/2402, 2019/897, 30.04.2019, Lexpera l.a.d.20.01.2024

45 Court of Cassation 9th Civil Chamber, 5846/5621, 22.03.2004, legalbank l.a.d.20.01.2024

an employee within the scope of the Labor Law[46]. Therefore, disputes arising from the employment contract between the employer club and the technical director should be adjudicated in labor courts, as the Labor Law does not foresee arbitration for labor claims other than those related to job security provisions. It was ruled that the existence of arbitration boards or tribunals established by federations through regulations or circulars would not eliminate the jurisdiction of labor courts regarding disputes between the technical director and the employer.

According to some authors in legal doctrine, limiting arbitration to only disputes regarding reinstatement is appropriate. According to one view, since the provision of the law under the title "*objection to termination notice and procedure*" is explicitly regulated, it can be understood that the legislator's intention is only related to objections to termination, and therefore, it cannot be applied to other disputes arising from employment contracts[47]. It has been argued that since labor courts are specialized courts established for the protection of employees, and in order to alleviate the workload of these courts, it is not appropriate to delegate the resolution of disputes to arbitrators[48].

According to some authors in legal doctrine, arbitration should be applicable in all areas of individual employment disputes. According to a view expressed before the enactment of Labor Law No. 4857, since parties can freely dispose of disputes through settlement or acceptance, the dispute is subject to the will of both parties. Therefore, arbitration agreements regarding employment disputes should be deemed valid[49]. Similarly, it is considered inappropriate to limit arbitration to reinstatement lawsuits, especially when compared to mediation, which also has a judicial aspect[50]. Indeed, it is not appropriate to limit arbitration to reinstatement claims in terms of labor claims[51]. When an employment dispute arises, it is possible for the parties to voluntarily resort to mediation. In this regard, the possibility of resorting to mediation has not been prevented due to concerns that the employer may exert pressure on the employee, given the

46 Court of Cassation 9th Civil Chamber, 400/7264, 18.03.2010. The same direction, see. Court of Cassation 9th Civil Chamber, 2015/24584, 2018/21216, 22.11.2018; 2008/601, 2009/14931, 01.06.2009; 2009/48047; 2012/10537, 28.03.2012, lexpera l.a.d.20.01.2024

47 Müjgan Yücel 'İş Güvencesi Kapsamında 'Özel Hakem Şartı' (İş Kanunu Madde 20)' (2004) (4) Legal İSGHD 1351; Şahin Emir (n 14) 915; F Barış Mutlay 'Bireysel İş Hukukunda Tahkim' (2006) (Master Degree) Marmara Üniversitesi, Sosyal Bilimler Enstitüsü 33

48 Yücel (n 47) 1364

49 Kuru (n 4) 5951

50 Şahin Emir (n 14) 917; Eda Manav Özdemir and Serhat Eskiyörük, 'İş Hukuku Uyuşmazlıklarının Tahkim Yolu ile Çözümlenmesi' (2020) 17 (67) Legal İSGHD 976; Eda Manav Özdemir, 'Bireysel İş Uyuşmazlıklarında Alternatif Çözüm Yöntemleri ve Tahkime İlişkin Değerlendirmeler' (2023) 50 Sicil İş Hukuku Dergisi 142

51 Şahin Emir (n 14) 917

employee's weak position. Moreover, the mandatory mediation requirement has been introduced as a condition precedent for filing a lawsuit, and it has not been deemed problematic for the employee to waive their rights during this process. Therefore, it would be appropriate to prioritize the parties' free will in resorting to arbitration, without limitation to claims related to reinstatement.

According to one viewpoint, limiting disputes that can be resolved through arbitration to reinstatement lawsuits reduces the likelihood of achieving the goal of reducing the workload in labor courts, which is one of the purposes of introducing arbitration in the law. Although a significant portion of labor disputes are related to job security, the workload in labor courts cannot be reduced solely by allowing arbitration for such disputes[52]. Moreover, while arbitration also has a judicial aspect, permitting arbitration only for objections to termination creates confusion by leading to a situation where some disputes arising from employment contracts are heard in arbitration while others are heard in labor courts[53]. Parties should be able to choose arbitration freely due to the advantages it offers, thereby facilitating the goal of reducing the workload in labor courts[54].

Contrary to the view that arbitration should be limited to reinstatement lawsuits due to the necessity of having specialized judges resolve labor disputes in labor courts, legal doctrine suggests that individuals with expertise in labor law can be selected as arbitrators. In fact, one of the reasons arbitrations is preferred is to have disputes resolved by experts. In labor courts, a significant portion of cases are resolved by resorting to expert opinions, and judgments are based on these expert reports[55]. This not only leads to delays but also entails additional costs. Instead, selecting arbitrators who possess legal and technical expertise related to the dispute can prevent both time and cost inefficiencies[56]. Furthermore, it is argued that the objective of labor courts to achieve swift, easy, and cost-effective resolutions can also be realized through arbitration[57].

Another viewpoint suggests that it is appropriate not to resort to arbitration for disputes arising from employment contracts concluded without equal bargaining power between the employee and the employer, to protect the employee. However, labor disputes should not be categorically deemed unsuitable for arbitration in all circumstances. There should be no hesitation regarding the possibility of

52 Mutlay (n 47) 33

53 Ömer Ekmekçi 'Toplu İş Hukuku Bakımından İş Güvencesi Yasa Tasarısının Değerlendirilmesi' (2001) İş Güvencesi Yasasının Değerlendirilmesi Türk Hukukunun Güncel Sorunları 2001 Temmuz Toplantısı İstanbul Barosu 60

54 Şahin Emir (n 14) 917

55 Aydın (n 13) 855

56 Pekcanıtez and Yeşilırmak (n 1) 2602,2603

57 Mutlay (n 47) 66

resorting to arbitration when a dispute arises from an employment contract that includes an arbitration clause. In such cases, the employee should no longer claim that arbitration is unsuitable[58]. This is because the employee, whose rights are intended to be protected, believes that their rights will be safeguarded through arbitration. For example, in a case where the managing director of a multinational company is party to an employment contract, initiating arbitration proceedings against the employer may be more advantageous for the employee in the position of managing director[59].

Based on the principle of protecting the employee, the viewpoint advocating for arbitration to be limited to disputes related to reinstatement in individual labor disputes argues that the employee, being in a weak position in the employment relationship, will also be disadvantaged in the arbitration process. However, it is not always the case that the employee is in a weak position in the employment relationship. It would not be appropriate to assert that disputes are unsuitable for arbitration based on the presumption that the employee is always in a weak position in every employment contract. Instead, the suitability for arbitration should be determined by considering the specific characteristics of the existing employment relationship and other circumstances of the case[60]. For instance, it would be difficult to argue that highly paid skilled workers or senior executives in a workplace are in a weak or vulnerable position in the employment relationship. It is likely that these employees would prefer to resolve any disputes that may arise quickly and confidentially through arbitration. Therefore, it should be acknowledged that arbitration can be chosen for the resolution of any employment dispute without being subjected to pressure from the employer, in line with their free will.

It should be noted here that regardless of the circumstances, it is important to apply Turkish labor law as much as possible in labor disputes. Therefore, it would not be correct to say that arbitration is suitable for all labor disputes. Additionally, when it comes to annulment proceedings in arbitration, the judge cannot delve into the substance of the matter but can only conduct a formal review. This could pose a problem in terms of labor disputes once again.

When evaluating whether an employee can still resort to labor courts despite agreeing to arbitration, it is crucial to determine whether arbitration serves as an alternative to the state judiciary or bypasses it. The Court of Cassation has ruled that arbitration agreements entered voluntarily by the parties will be valid only for reinstatement lawsuits, but such agreements cannot eliminate

58 Akıncı (n 19) 105; Özel (n 24) 49

59 Akıncı (n 19) 105

60 Şahin Emir (n 14) 925; Bengi Sargın 'Bireysel İş Uyuşmazlıklarında Tahkime Elverişlilik' (2021) 16 (177) Terazi Hukuk Dergisi 927

the jurisdiction and authority of labor courts[61]. According to one viewpoint, an arbitration agreement does not nullify the jurisdiction of the court. If the parties decide to resort to arbitration, the employee retains the option to choose whether to go to court or arbitration[62]. Conversely, another viewpoint suggests that an arbitration agreement eliminates the jurisdiction of the court. In this scenario, once an arbitration agreement is made, the option to approach the labor court is closed, and the dispute can only be taken to arbitration[63]. It is essential for the intention to resort to arbitration to be clearly and unequivocally expressed in the arbitration agreement. Any doubt regarding the parties' intention to resort to arbitration should be eliminated. Accepting that the parties retain the right to go to court despite entering into an arbitration agreement indicates that the intention for arbitration is not definitive.

D. ARBITRATION AGREEMENT IN INDIVIDUAL LABOR LAW

1. Subject Matter of the Arbitration Agreement

Since the arbitration agreement or clause is a contract in the context of contract law, like any contract, it must comply with law and morality. The Court of Cassation has ruled that arbitration agreements made in a manner contrary to morality concerning labor disputes will be void. In one of its decisions, the 22nd Civil Chamber of the Court of Cassation ruled that if one party, using its economic and social superiority over the other party, imposes conditions in the arbitration agreement that would disrupt equality in its favor, the contract would be deemed contrary to morality, and an arbitration agreement contrary to morality would be invalid[64]. Giving one party the opportunity to select more than half or all the arbitrators was cited as an example of this situation. It was stated that since the employee, who is economically weak compared to the employer, is dependent on the employer in the establishment and continuation of the employment contract, there cannot be freedom of will under the employer's control, and if the employer, in this case, uses its superiority over the employee to impose conditions that disrupt equality in its favor, the arbitration agreement would be void.

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61 Court of Cassation 9th Civil Chamber, 2016/21367, 2017/14609, 02.10.2017, Legalbank, l.a.d.20.01.2023

62 Devrim Ulucan, *İş Güvencesi* (2nd edn Türkiye Toprak Seramik Çimento ve Cam Sanayii İşverenleri Sendikası 2003) 77

63 Ercan Akyiğit 'İş Güvencesi Uyuşmazlığının Özel Hakeme Götürülmesi' (2004) Ağustos-Kasım TÜHİS 119

64 Court of Cassation 22nd Civil Chamber, 27461/21048, 26.09.2016; For the same view, see Bursa Regional Court of Justice 3rd Civil Chamber, 2018/3462, 2019/355, 08.02.2019; Court of Cassation 9th Civil Chamber, 2007/35895, 2008/11994; 2007/28539, 2007/26478, Legalbank, l.a.d.20.01.2024

2. Time of Making the Arbitration Agreement

In essence, the arbitration agreement can be made before or after the dispute arises. However, regarding individual labor disputes, there is no separate regulation in the Labor Law regarding when the arbitration agreement should be made. According to the established practice of the Court of Cassation, arbitration agreements made during the establishment and continuation of the employment contract are invalid. In a decision of the 9th Civil Chamber of the Court of Cassation in 2010, it was stated that from the wording of Article 20 of the Labor Law, it is understood that the private arbitration institution is regulated as a consequence of termination[65]. However, it was also emphasized that the employee is economically weak compared to the employer and is dependent on the employer in the establishment and continuation of the employment contract, and that there is no freedom of will under the authority and control of the employer, and dependency ceases with termination. Therefore, it was stated that recourse to private arbitration through agreement is only possible after the termination of the employment contract in cases of reinstatement claims. In the specific case, it was ruled that since the protocol containing the private arbitration condition signed by the employee while working at the workplace was arranged before the termination of the employment contract, the private arbitration agreement was invalid.

However, previously the Court of Cassation had ruled that the fact that the arbitration agreement was agreed upon during the establishment or continuation of the employment contract alone would not demonstrate the acceptance by free will and that the impairment of will would need to be proven separately[66].

According to the decision of the 9th Civil Chamber of the Court of Cassation in 2013, in the case at hand, it was stated in the document titled "Release and Waiver" issued on the date of termination that the employee had waived all rights and claims against the employer, and in case of wanting to file a lawsuit, they would resort to private arbitration according to Article 20 of the Labor Law, and this agreement was stated to be a arbitration agreement made with the consent of the parties[67]. The Court of Cassation, considering that the document containing the arbitration clause was issued on the same date as the termination

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65 Court of Cassation 9th Civil Chamber, 2009/15514, 2010/3362, 15.02.2010. For the same view, see. 2009/15515, 2010/3363, 15.02.2010; 5916/30463, 10.11.2008; 2010/46608, 2011/1381, 31.01.2011; 5830/29774, 03.11.2008, Lexpera, l.a.d.20.01.2024; Court of Cassation 22nd Civil Chamber, 27461/21048, 26.09.2016, kararama.yargitay.gov, l.a.d.20.01.2024

66 Court of Cassation 9th Civil Chamber, 37878/35335, 26.11.2007, for the evaluation of the decision, see. Nuri Çelik 'İş Sözleşmesinde Kararlaştırılan Özel Hakem Anlaşmasının İradeyi Sakatlayan Bir Durumun Varlığı İspatlanmadıkça Geçerli Sayılması' (2007) 9 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 17

67 Court of Cassation 9th Civil Chamber, 1773/6664, 25.02.2013, Legalbank l.a.d.20.01.2024

notice, concluded that the employee was still under the control of the employer, therefore, it could not be accepted that the arbitration clause was later arranged. Additionally, it was noted that the document also included payment of labor rights, thus linking the payment of rights to the signing of the contract containing the arbitration clause, and that the employer, by using its superiority over the employee, imposed conditions in its favor, hence the arbitration agreement did not reflect the employee's clear and definitive arbitration will, and therefore, the arbitration clause was deemed invalid by a majority vote. As understood from the decision, the Court of Cassation accepted that even if the arbitration agreement was made after the termination of the employment contract, for the agreement made on the same day as the termination notice, the employee was still under the influence and authority of the employer. In the dissenting opinion against the decision, it was stated that it was not necessary for the private arbitrator clause to be made on a date after termination to be valid, and that it could be made on the same date as the termination. Additionally, it was emphasized that although provisions regarding release and waiver were included in the contract, the mere assertion of the employee that "*if I had not signed the document, my receivables would not have been paid*" was not sufficient to prove will impairment. Both parties accepted that the private arbitration agreement was made after termination, and it was stated that the decision was not agreed upon due to the lack of evidence of will impairment being proven in accordance with the procedure.

According to the prevailing view in doctrine, parallel to the established practice of the Court of Cassation, it is accepted that the parties can enter into an arbitration agreement after the termination of the employment contract. Therefore, arbitration agreements made during the establishment or continuation of the employment contract should not be considered valid due to the lack of freedom of will of the employee being dependent on the employer during this process[68]. Conversely, according to an opposing view, parties can agree to refer the dispute to private arbitration during the establishment or continuation of the contract[69].

According to one viewpoint, it is not practically feasible for parties to come together and agree to arbitration after the termination of the employment contract. This is because when the employment relationship becomes untenable, the

[68] Çelik (n 66) 26; Sarper Süzek, *İş Hukuku* (23rd edn Beta 2023) 638; Öner Eyrenci '4857 Sayılı İş Kanunu ile Getirilen Yeni Düzenlemeler Genel Bir Değerlendirme' (2004) 1 Legal İSGHD, 36; Pekcanıtez and Yeşilırmak (n 1) 2640; Eda Manav Özdemir 'İş Mahkemelerinin İşleyişi ve Bireysel İş Uyuşmazlıklarının Alternatif Çözüm Yöntemleri' (2015) 4 Çalışma ve Toplum 990; Mutlay (n 47) 79

[69] Münir Ekonomi 'Hizmet Akdinin Feshi ve İş Güvencesi' (2003) Mart Özel Eki Çimento İşveren Dergisi 25; Cevdet İlhan Günay 'İş Güvencesi Uygulamasında Hukuki Sorunlar ve Öneriler' (2010) Osman Güven Çankaya'ya Armağan Kamu-İş 176.

parties may not wish to interact with each other[70].

Another perspective suggests that the validity of the arbitration clause inserted during the establishment of the employment relationship should be assessed based on whether it nullifies the jurisdiction of the court. If it is accepted that the arbitration clause does not nullify the jurisdiction of the court, the employee's recourse to the court remains available, regardless of whether the arbitration clause was agreed upon during hiring, during the continuation of the employment relationship, or after termination. However, if it is accepted that the arbitration clause nullifies the jurisdiction of the court, it is stated that the arbitration clause inserted into the contract at the time of hiring would be invalid[71]. According to this view, the arbitration clause inserted during the continuation of the employment relationship should be considered valid if the employee's will be not impaired[72].

According to another perspective, since the Labor Law does not set any time limit for the conclusion of an arbitration agreement, the timing of the contract's signing should not be considered relevant to the validity of the arbitration agreement as long as the employee's will is not impaired[73]. The specific characteristics of the case should be considered. In this regard, factors such as whether the employee was sufficiently informed about the matter, the education level of the employee, and the nature of the work the employee is required to perform should be considered. By doing so, it can be determined whether the employee wishes to resort to arbitration freely, without being under pressure[74].

Indeed, the employee party to an employment contract may not always be in a weak, disadvantaged position. Qualified employees in the workplace, including top-level executives, cannot be considered as the weaker party in the contract. These employees may possess extensive knowledge about the operation of the workplace, business secrets, and may not be inherently weak, ignorant, or inexperienced to understand the nature of an arbitration agreement. Therefore, parties may prefer to resolve disputes through arbitration, quickly and confidentially. Hence, rather than deeming the contract invalid due to the arbitration agreement being concluded before the termination of the employment contract, it would be more appropriate to evaluate the parties' qualifications and negotiating power. While it can be accepted that employees in a weak position may not be able to freely enter into an arbitration agreement during the establishment and continuation of the employment contract, the same may not apply to employees who are not in a weak position. Therefore, for these

70 Tankut Centel, *İş Güvencesi*, (2nd edn Legal 2020) 203,204; Aydın (n 13) 860

71 Akyiğit (n 63) 119; Aydın (n 13) 850

72 Akyiğit (n 63) 119

73 Şahin Emir (n 14) 937

74 ibid 939

employees, it should be acknowledged that an arbitration agreement can be concluded during the establishment and continuation of the employment contract.

3. The Form and Procedure of Arbitration Agreement

Regarding the form of the arbitration agreement for individual employment disputes, there is no specific regulation in the Labor Law. Therefore, it would be appropriate to apply the provisions of the Code of Civil Procedure No. 6100 concerning the formality of arbitration agreements also to arbitration agreements related to labor disputes. Accordingly, according to the third paragraph of Article 412 of the Law, the arbitration agreement must be made in writing[75]. The arbitration agreement for the resolution of individual employment disputes can be arranged either as a provision in a contract between the parties or as a separate agreement. It may also be evaluated whether the arbitration agreement can be included as a condition in workplace regulations or in standard employment contracts as a general transaction condition.

Workplace regulations (internal workplace regulations) are regulations unilaterally prepared by the employer to be applied throughout the workplace or in a specific section to establish a uniform working regime and to regulate some working conditions in a general and abstract manner[76]. Workplace regulations become annexed to the employment contract with the employee's acceptance. Workplace regulations are generally considered as general transaction conditions, and their binding effect on the employee is evaluated within this framework.

A general transaction condition refers to the contract provisions unilaterally prepared by one of the parties for use in numerous similar contracts in the future and presented to the other party during contract negotiations[77]. In terms of labor law, general transaction conditions may manifest as standard employment contracts - standard contract forms. Standard employment contracts (agreements) contain predetermined working conditions, and there is no negotiation or discussion between the employee and the employer regarding these conditions[78]. These regulations, considered as general transaction conditions, are subject to evaluation within the framework of Articles 20-25 of the Turkish Code of Obligations No. 6098. Accordingly, provided that the employer clearly informs the employee of the existence of these conditions and enables the employee to learn their

[75] Akyiğit (n 63) 120

[76] Çelik, Caniklioğlu, Canbolat and Özkaraca (n 36) 254,255; Süzek (n 68) 65; Hamdi Mollamahmutoğlu, Muhittin Astarlı and Ulaş Baysal, *İş Hukuku Ders Kitabı Cilt:1 Bireysel İş Hukuku* (6th edn Lykeion 2022) 15; Aydın Başbuğ and Mehtap Yücel Bodur, *İş Hukuku* (5th edn Beta 2018) 25; Emine Tuncay Senyen Kaplan, *Bireysel İş Hukuku* (10th edn Gazi 2019) 17; Uşan and Erdoğan (n 36) 48

[77] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (20th edn Yetkin 2016) 215

[78] Süzek (n 68) 64

content and the employee accepts them, general transaction conditions contrary to the interests of the employee become part of the contract (Turkish Code of Obligations No. 6098, Art. 21).

In a decision rendered by the 9th Civil Chamber of the Court of Cassation in 2008, it was ruled that if the arbitration clause is obtained from each employee through a standard contract, the clause does not reflect the employee's free will and therefore is not valid[79]. Indeed, if the arbitration clause is included in workplace regulations or standard employment contracts as a non-negotiable general transaction condition, it appears difficult to argue that the employee's free will is present and that a valid arbitration agreement exists. According to the viewpoint acknowledging that employees who are economically weak and dependent on the employer when establishing or continuing an employment relationship cannot freely enter into arbitration agreements before the termination of the employment contract, the arbitration clause envisaged in workplace regulations or standard employment contracts is also considered invalid for the same reason[80].

It is emphasized that workplace regulations, which constitute general and uniform rules to be applied in the workplace, and standard employment contracts prepared for application to multiple employees are unilaterally prepared by the employer, leaving no opportunity for negotiation by the employee. Therefore, it is stated that the validity of the arbitration clause included in these regulations poses serious problems in reflecting the true will of the employee[81]. Nevertheless, it is highlighted that, without a prior assessment of the validity of the arbitration clause, an evaluation of the specific characteristics of the case is required to determine whether the employee was adequately informed about the arbitration clause, whether the employee accepted it, and whether they were in a weak position in the contract[82].

E. EMPLOYEE INVENTIONS

The regulations concerning employee inventions are stipulated in Articles 113-122 of Law No. 6769 on Industrial Property[83], and within this framework, mandatory arbitration for employee inventions is provided for in Article 24 of the Regulation on Employee Inventions, Inventions Realized at Higher Education Institutions, and Inventions Arising from Publicly Funded Projects. According to the Regulation, an employee refers to individuals who are in a personal dependency

79 Court of Cassation 9th Civil Chamber, 38211/28868, 27.10.2008

80 Süzek (n 68) 638; Eyrenci (n 68) 36

81 Şahin Emir (n 14) 925; Mutlay (n 47) 76

82 Şahin Emir (n 14) 925; Sargın (n 60) 927

83 Official Gazette of the Republic of Turkey 10.01.2017/29944

relationship with an employer, being obliged to fulfill specific tasks assigned by the employer within the scope of a private law contract or a similar legal relationship, as well as public officials (Article 4/1, b). An employee invention, on the other hand, encompasses service inventions or free inventions that can be protected by patent or utility model, realized by the employee (Article 4/1, c).

In the event of an employee realizing an invention, the obligation to notify the employer of this is envisaged, and it is regulated that in this case, the employer may claim full or partial rights over the invention (Article 115/1 of Law No. 6769). Faced with such a claim, the employee has the right to demand a reasonable compensation in return (Article 115/6 of Law No. 6769). Factors such as the economic assessability of the invention, the employee's role in the business, and the contribution of the business to the realization of the invention will be considered in calculating the compensation to be paid (Article 115/7 of Law No. 6769). It is stipulated that in the event of the parties failing to agree on the amount of compensation, the dispute shall be resolved through arbitration (Article 24/1 of the Regulation). In this case, mandatory arbitration for the resolution of the dispute is provided without the requirement of a written arbitration agreement. The applicable provisions are those relating to arbitration in Law No. 6100 on Civil Procedure, and in case the dispute involves a foreign element, Law No. 4686 on International Arbitration shall apply (Article 24/2 of the Regulation). The parties are also provided with the opportunity to resolve the dispute through mediation before resorting to arbitration (Article 24/5 of the Regulation).

III. RECOMMENDATIONS FOR THE APPLICATION OF ARBITRATION IN INDIVIDUAL EMPLOYMENT DISPUTES

A. A SIMILAR APPROACH TO CONSUMER ARBITRATION BOARDS

The establishment of a structured arbitration system for the resolution of individual employment disputes through arbitration is considered. In this regard, the Ministry of Justice has contemplated the development of an approach like consumer arbitration boards. Pursuant to Article 66 of Law No. 6502 on the Protection of Consumers[84], consumer arbitration boards have been established to resolve disputes arising from consumer transactions or practices directed towards consumers. It is mandatory to apply to consumer arbitration boards for consumer disputes up to a certain amount. Subject to the parties' rights under the Enforcement and Bankruptcy Law, application to the consumer arbitration board is mandatory for disputes valued at less than thirty thousand Turkish Liras. No application to consumer arbitration boards can be made for disputes exceeding this amount (Article 68/1 of Law No. 6502). The dispute amount threshold changes annually.

[84] Official Gazette of the Republic of Turkey 28.11.2013/28835

The application can be made to the consumer arbitration board located in the consumer's place of residence or where the consumer transaction took place. In places where there is no consumer arbitration board, application can be made to the district governorship. These applications are forwarded to the authorized consumer arbitration board determined by the Ministry for the necessary action to be taken by the governorships (Article 68/3 of the Consumer Protection Law).

Decisions of consumer arbitration boards are binding on the parties (Article 70 of Law No. 6502). Parties may appeal to the consumer court within fifteen days from the date of notification of the consumer arbitration board's decision. The appeal does not suspend the enforcement of the consumer arbitration board decision. However, upon request, the judge may suspend the enforcement of the consumer arbitration board decision as a precautionary measure (Article 70/3 of Law No. 6502).

If it is deemed necessary to accept the objection due to the decision being substantively lawful and there being an error in the application of the law to the case, or if it does not require retrial due to non-compliance with the law, the consumer court may affirm the decision by changing or correcting it based on the documents. This provision also applies to errors concerning the identities, trade names, writing, calculations, or other explicit expressions. If the decision is found to be procedurally and legally compliant but the rationale is deemed incorrect, the rationale may be changed or corrected, and the decision shall be affirmed accordingly (Article 70/4 of the Consumer Protection Law). The decision of the consumer court upon appeal against consumer arbitration board decisions is final (Article 70/5 of the Consumer Protection Law).

Although the establishment of a system similar to consumer arbitration boards may be considered as a recourse for individual employment disputes, it is noted that such a method may not expedite dispute resolution or alleviate the workload of the courts, given the high number of applications to consumer arbitration boards in our legal system and the fact that a significant portion of these applications are subsequently referred to courts as litigation[85].

In 2012, efforts were made by the Ministry of Justice to establish a mechanism like consumer arbitration boards in order to resolve labor disputes without resorting to court litigation. Within this scope, a working group consisting of academics, representatives from the Court of Cassation, judges, and representatives from relevant institutions and civil society organizations was formed. The working group proposed the establishment of three-member arbitration boards chaired by the provincial directorate of labor in each province and in some districts, comprising a representative from the labor union and a representative from the employer union. These arbitration boards were intended to resolve labor disputes

[85] Manav Özdemir, Alternatif Çözüm (n 68) 209

amounting to less than five thousand Turkish Liras. It was also proposed that there be a right to appeal the decisions of these boards to labor courts, with the court's decision being final. The aim was to ensure alignment with the existing Labor Courts Law, Code of Civil Procedure, and the establishment of the arbitration board. A draft law proposal was prepared at the end of the study, but it was not implemented[86].

Considering some hesitations existing in insurance arbitration, it may be more appropriate to establish a structure like the consumer arbitration board. As we will express below, the system in insurance arbitration is financed by insurance companies, but which employer can finance it in labor disputes? Moreover, the number of insurance companies is more manageable, but in Turkey, there are thousands of employers, and not all of them have the same scale of workplace.

B. ESTABLISHMENT OF A BODY SIMILAR TO CONSUMER ARBITRATION BOARDS

For individual employment disputes, consideration could be given to enacting a regulation like the insurance arbitration commission system. Article 30 of Law No. 5684 on Insurance[87] regulates arbitration in insurance matters, establishing the Insurance Arbitration Commission under the Turkey Insurance, Reinsurance and Pension Companies Association. According to the relevant provision, disputes arising between the insured or beneficiaries of the insurance contract and the party assuming the risk or beneficiaries of the account shall be resolved by an arbitrator/arbitration panel appointed by the Insurance Arbitration Commission. The dispute must arise from the insurance contract for it to be subject to arbitration[88]. In cases where the Insurance Law does not provide provisions, the provisions of the Civil Procedure Law shall be applied by analogy (Article 30/23 of Law No. 5684).

Insurance companies wishing to participate in the arbitration system must notify the Insurance Arbitration Commission in writing. Even if there is no specific arbitration clause in the contract in question, the party in dispute with an insurance company that is a member of the arbitration system may resort to arbitration. In other words, a separate arbitration agreement is not required between the insurer and the insured or beneficiaries of the insurance contract for arbitration to be initiated. The insurer's membership in the insurance arbitration system is sufficient for the opposing party to initiate arbitration[89]. However, in

86 ibid 209

87 Official Gazette of the Republic of Turkey 14.06.2007/26552

88 Ekşi (n 2) 43

89 ibid 44

disputes arising from compulsory insurance, even if the relevant organization is not a member of the insurance arbitration system, claimants may still benefit from arbitration proceedings (Article 30/1 of Law No. 5684).

The insured or beneficiaries of the insurance contract are not obliged to resort to insurance arbitration; they may choose to file a lawsuit in court if they wish. Conversely, individuals in dispute with an insurance company may opt to initiate arbitration proceedings if they so desire, thus exercising their discretionary right. However, once the insured or beneficiaries of the insurance contract have initiated arbitration for dispute resolution, the insurance company cannot raise objections to insurance arbitration[90]. Therefore, this type of arbitration cannot be classified as mandatory arbitration, nor can it be considered optional arbitration[91].

Regarding disputes brought before the Insurance Arbitration Commission, objections can be lodged with the Commission within ten days against arbitrator decisions pertaining to disputes amounting to fifteen thousand Turkish Liras or more. Decisions issued for disputes below fifteen thousand Turkish Liras are final. Appeals can be made to the appellate court against decisions made upon objection for disputes exceeding two hundred thirty-eight thousand seven hundred thirty Turkish Liras. As the appellate process is available for arbitration decisions, the provisions of Law No. 6100 on the annulment of arbitrator decisions will not be applicable to insurance arbitration[92].

Given the discretionary nature of the Insurance Arbitration Commission system for the insured or beneficiaries, it could be considered as a viable mechanism for resolving employment disputes. However, if a similar system were to be established for employment disputes, several considerations would need to be addressed. These include potential limitations based on the subject matter and monetary value of employment disputes, the application of membership requirements for employers by insurance companies, whether membership requirements would apply to all employers or if restrictions would be imposed, and whether compliance with the mandatory mediation requirement for individual employment disputes should still be ensured before resorting to the arbitration commission. Additionally, determining the party responsible for covering the expenses incurred as a result of arbitration proceedings is also a crucial aspect to consider.

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90 Mehmet Özdamar 'Sigorta Hukukunda Uyuşmazlıkların Çözümünde Tahkim Sistemi' (2013) 17 (1-2) Gazi Üniversitesi Hukuk Fakültesi Dergisi 838

91 Ekşi (n 2) 44

92 ibid 47

CONCLUSION

Employment disputes concern workers who, economically disadvantaged and reliant on their employers to sustain their livelihoods, contribute their labor. Therefore, it is crucial to resolve these disputes quickly, easily, and economically without causing detriment to the parties involved. The primary venue for resolving employment disputes is the labor courts, where specialized judges in labor law preside. However, the increasing number of disputes continues to burden the already overwhelmed labor courts. Hence, alternative dispute resolution methods that offer faster and easier resolution than courts are important. In compliance with international agreements and to alleviate the workload of labor courts, arbitration was introduced for individual employment disputes through Law No. 4857, albeit with limited applicability mainly concerning claims of invalid termination. However, the intended effect of reducing the workload of arbitration courts has not been achieved due to limited scope and narrowing through judicial decisions.

Individual employment disputes are conflicts that parties can freely dispose of and settle through conciliation or acceptance. Although parties can agree to resolve disputes through voluntary mediation, they are also subject to mandatory mediation. Consequently, during the mediation stage, workers may freely negotiate with employers and may choose to waive certain rights. However, due to the economic vulnerability of workers and their dependency on employers in employment relationships, the resolution of disputes through arbitration is approached with caution in line with the principle of protecting workers. While there is no provision expressly prohibiting the resolution of employment disputes through arbitration, it is primarily accepted in case law and doctrine that arbitration is only available for reinstatement claims, as stipulated in Article 20 of the Labor Law. While it may be argued that the legislator's intention was solely to allow arbitration for reinstatement claims, such a restriction for disputes where parties can freely dispose of their rights and settle through mediation is not appropriate. Priority should be given to the freely exercised will of the worker to resort to arbitration, who has the opportunity to freely negotiate during the mediation stage. Therefore, parties should be given the option to resort to arbitration for other individual employment disputes beyond those related to job security.

The prevalent view in both judicial decisions and legal doctrine is that parties can only enter into a valid arbitration agreement after the termination of the employment contract. In essence, an arbitration agreement can be made before or after the emergence of a dispute. However, there is no separate regulation regarding this matter concerning employment disputes. Moreover, it cannot be inferred from the wording of the provision concerning reinstatement that there is a requirement for the arbitration agreement to be made after the termination of the employment contract. Nevertheless, it can be argued that the worker

may not have full freedom of will to enter into an arbitration agreement at the time of entering into the employment contract due to concerns about securing employment, and during the continuation of the contract, due to concerns about income and dependency on the employer. Therefore, it is favorable for the arbitration agreement to be made after the termination of the employment contract to ensure the worker's free will. However, it is difficult for parties to come together and agree to resort to arbitration after the termination of the employment contract and the emergence of a dispute. While it may be concluded that the worker may exercise their free will to enter into an arbitration agreement after the termination of the employment contract, this may not be applicable to all employment relationships. For example, it is difficult to argue that highly paid qualified employees or senior executives are in a weak position in their employment relationships. It should be acknowledged that employees in such positions may prefer to resort to arbitration freely during the establishment, continuation, and termination of the employment contract for the purpose of expeditiously and confidentially resolving disputes. Therefore, depending on the specifics of the case, validity should be given to the arbitration agreement made during the establishment or continuation of the employment contract without considering the arbitration agreement as initially void.

Contrary to popular belief, the arbitration route, which is generally considered to be limited in terms of worker protection, can actually create an advantageous situation for the worker. Disputes can be resolved much more quickly through arbitration than through court litigation, and the cost of arbitration is not as high as commonly thought. Especially during periods of high inflation, arbitration is a favorable institution for workers to promptly recover their receivables. The widespread adoption of arbitration, changing society's perception of courts and dispute resolution, fostering a culture of settlement, and encouraging the voluntary adoption of these methods can facilitate this process. Until society embraces this mindset, a corporate arbitration structure for resolving individual employment disputes can be established while considering concerns for worker protection and without disregarding party intentions. Through regulations, organization establishment, and oversight mechanisms, disputes can be resolved outside of court litigation.

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