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Correspondence Address

İstanbul Üniversitesi, Hukuk Fakültesi,
İstanbul Üniversitesi, Beyazıt Kampüsü,
34116 / İstanbul, Türkiye
Phone: +90 (212) 440 01 05
E-mail: annales@istanbul.edu.tr
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RESEARCH ARTICLE

Transformation From Soft Law to Hard Law of International Environmental Protection: Process, Basic Concepts And Principles – Part II: "No transboundary environmental harm", "Precautionary", "Environmental impact assessment" and "Access to information and participation in decision-making process" principles*

Mehmet Semih Gemalmaz**

3. No (transboundary) Environmental Harm Principle

i. Recognition and scope of the principle in soft law instruments

Following the adoption of the UN General Assembly resolution 626 (VII) of 21/12/1952 on the "*Right to exploit freely natural wealth and resources*"[1] in which this right of peoples has been recognized as "inherent in their sovereignty" and as complying with the purposes and principles of the UN Charter[2], a significant step was taken by the adoption of the UN General Assembly resolution 1803 (XVII) of 14/12/1962 on *"Permanent sovereignty over natural resources*".[3] The 1962 resolution was adopted as an economic aspect of self-determination, which declared that "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned", (para.1).[4] Although the UNGA

1 The UN General Assembly Resolution 626 (VII) on "*Right to exploit freely natural wealth and resources*" was adopted on 21 December 1952, (411th plenary meeting), UN Doc A/Res/626 (1952). In operative paragraph 2 of this resolution the GA recommends to all Member States to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources.

2 James N. Hyde, 'Permanent Sovereignty over Natural Wealth and Resources' (1956) 50 (4) AJIL 854.

3 The UN General Assembly Resolution 1803 (XVII) on "*Permanent sovereignty over natural resources*" was adopted on 14 December 1962; 17 UN GAOR (1194th plenary meeting), UN Doc A/Res/1803 (1962). Paragraph 7 of the Resolution 1803 provided that "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace".

4 For an analytical review of the Resolution 1803 (XVII) of 14/12/1962, see, Karol N. Gess, '*Permanent Sovereignty over Natural Resources'* (1964) 13 (2) ICLQ 398 (The author stated that "the General Assembly intended to set forth, within the vehicle of a

* Part I of the present paper has been published in Annales of Istanbul University, '*Transformation From Soft Law to Hard Law of International Environmental Protection: Process, Basic Concepts and Principles- Part 1: "Common Heritage of Mankind","Present and Future Generations", "Inter/Intra-generational Equity" and "Sustainable Development*" (2022) 71 Annales de la Faculté de Droit d'Istanbul 119.

Corresponding Author: Mehmet Semih Gemalmaz (Prof. Dr.), İstanbul, Türkiye. E-posta: msgemalmaz@gmail.com
ORCID: 0000-0002-7686-5612

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Resolution 1803 did not provide for conservation of natural wealth and resources, the standard proclaimed by this resolution was subsequently used for the protection of the environment at the 1972 Stockholm and the 1992 Rio Conferences.[5]

Principle 21 of the 1972 Stockholm Declaration provides:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[6]

Principle 22[7] of the 1972 Stockholm Declaration requires States to further develop the international law regarding liability and compensation for victims of pollution and other environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

The UN General Assembly Resolution 2995 (XXVII) on "*Cooperation between States in the field of environment*"[8], adopted on 15/12/1972, emphasizes that "in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction", (para.1). This Resolution recognizes that Principle 21 of the Stockholm Declaration "will be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out" by the acting State "with a view to avoiding significant harm that may occur in the human environment of an adjacent area". It further recognizes that technical data "will be given and received

declaration, the basic principles and modalities of the exercise of permanent sovereignty over natural resources, subject to the overriding requirement that both principles and modalities of exercise be in conformity with the rights and duties of States under existing international law, and, further, that the principles set forth reflect minimum standards", *ibid* 411).

5 See, Ayesha Diaz, 'Permanent Sovereignty over Natural Resources' (1994) 24 (4) EPL 157; Patricia Birnie, 'Environmental Protection and Development' (1995) 20 (1) Melb. Univ. Law Rev. 69.

6 The "*Declaration of the United Nations Conference on the Human Environment*" ("Stockholm Declaration") was adopted on 16/06/1972 by the United Nations Conference on the Human Environment held at Stockholm from 5 to 16 June 1972, in, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14/Rev. 1, sec. 1, (1972); *reprinted in*, 11 ILM 1416 (1972). Principle 21 of the Stockholm Declaration was originally accompanied by a proposed Principle 20 that would affirm a duty to inform transboundary risks. The proposed Principle 20 was as follows: "Relevant information must be supplied by States on activities or developments within their jurisdiction or under their control whenever they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction". However, in view of the controversy over the proposal the Stockholm Conference decided to omit the controverted Principle 20 of the Declaration. Consequently, the duty to inform did not get sufficient support at the Conference to be recognized as a principle of international law; See, Daniel Partan, 'The "Duty to Inform" in, International Environmental Law' (1988) 6 (1) B. U. Int'l L. J. 43, 44-46; Louis B. Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 (3) Harv. Int'l L. J. 493, 496-502; M. Semih Gemalmaz, 'Introduction to International Environmental Law: From Initial Steps to Institution Building for the Conservation of Environment-Part 1' (2021) 33 (2) ERPL/REDP 255, 361; M. Semih Gemalmaz, 'Introduction to International Environmental Law: From Initial Steps to Institution Building for the Conservation of Environment-Part II' (2021) 33 (3) ERPL773, 786-787. Gemalmaz (n *) 129-132, 144-145, 149.

7 Sohn (n 6) 493-502.

8 The UN General Assembly Resolution 2995 (XXVII) on "*Cooperation between States in the field of environment*" was adopted on 15/12/1972 at 2112th plenary meeting. The vote was 115 to none, with 10 abstentions. This Resolution was based on a proposal made by Brazil.

in the best spirit of cooperation and good neighborliness". In the UNGA Resolution 2996 (XXVII) of 15/12/1972, entitled "*International responsibility of States in regard to the environment*", the General Assembly, after recalling Principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment concerning the international responsibility of States in regard to the environment, stated that those principles lay down the basic rules governing this matter. Additionally, it declared that no resolution adopted at the 27th session of the General Assembly could affect Principles 21 and 22 of the Declaration.[9] With regard to duty to inform aspect of the issue the 1972 General Assembly resolution was criticized as it failed to affirm the duty to inform in a clear and straightforward manner.[10]

Undoubtedly Principle 21 is one of the most important principles laid down by the Stockholm Declaration since it balances two basic elements, namely, the right of a State to develop its economy and the duty not to cause transfrontier environmental harm.[11] "Principle 21, in a characteristic UN formulation asserted the competing principles of international responsibility and national authority within a general framework of international rights and obligations".[12] Thus, Principle 21 of the Stockholm Declaration confirms the basic structure of the environmental conflict. "This two-way definition" is repeated in more or less the same form in many international environmental instruments. "It is a 'process-definition': it indicates the relevant values but leaves the determination of their normative impact into further process".[13] According to Sohn "Principle 21 makes clear that the rule of responsibility applies not only to damage caused to environment of other states but also to any injury inflicted on the environment of 'areas beyond the limits of national jurisdiction', such as the high seas or Antarctica. Within the ambit of the principle are not only damage-causing activities within the area under a state's jurisdiction, including its territorial waters, but also activities conducted by persons or ships under its 'control', wherever they may act".[14]

9 The UNGA Resolution 2996 (XXVII) on "*International responsibility of States in regard to the environment*" was adopted on 15/12/1972 at 2112th plenary meeting. The vote was 111 to none, with 11 abstentions. Also see Partan (n 6) 47; Sohn (n 6) 502.

10 Partan (n 6) 48 (After having examined various documents and developments, the author in his analysis concluded that "the 'duty to inform' has become a cornerstone of the effort to bring transboundary environmental risks under governmental control. Without full information concerning the nature and extent of the risks to which their territories and peoples are subject, governments cannot respond effectively to the increased magnitude and new forms of transboundary risks created by the use of new technologies. The source state ought therefore to be legally obligated to provide affected states with all relevant and available information needed to cope with such risks", *ibid* 87-88).

11 Pierre-Marie Dupuy, 'Overview of the Existing Customary Legal Regime regarding International Pollution', in Daniel Barstow Magraw (ed) *International Law and Pollution* (Penn Press 1988) 61, 64; Sohn (n 6) 485-493 (In view of the author Principle 21 "attempts to balance the right of a state to control matters within its territory with its responsibility to ensure that what is done within that territory does not cause damage outside", *ibid* 485-486); Further see, Gemalmaz, '*Introduction to International Environmental Law: Part II'* (n 6) 786-787; Gemalmaz (n *) 129-132.

12 Oscar Schachter, 'The Emergence of International Environmental Law' (1990) 44 (2) J. Int'l Aff. 457, 459.

13 Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 (1) Nordic J. Int'l L. 73, 76.

14 Sohn (n 6) 493.

Handl is of the opinion that Principle 21 "can only be understood as referring to material damage alone, and that it thus confirms that material damage is the precondition for a state's responsibility arising out of an activity lawful *per se*".[15] Furthermore, reading Principle 21 from the perspective of unilateral state action Bilder argued that this principle "implies that a state threatened by another state's breach of this duty has the right to take reasonable action to protect itself from environmental damage. To the extent that international law presently recognizes such a principle, the arguments for the legitimacy of unilateral action may be strengthened".[16] Both Principles 21 and 22 of the Stockholm Declaration were designed to deal with responsibility and liability for environmental harm based on existing international law at the time in question. However, "in their generality, they did not address what was meant by a state being responsible, or what principles of liability should be applied, only that they should be developed further. Nor did the (Stockholm) Declaration shed any light on how questions of liability and responsibility should be settled. Nevertheless, both Principles were based on previous statements of law."[17]

In addition to the aforementioned documents, Principle 21 of the Stockholm Declaration has subsequently been reaffirmed by several decisions of international bodies, such as the European Economic Community (European Union, EU)[18] or the Organization for Economic Cooperation and Development (OECD), as well as in various instruments.[19] For example, in the UN General Assembly Resolution

15 Günther Handl, 'Territorial Sovereignty and the Problem of Transnational Pollution' (1975) 69 (1) AJIL 50, 67 (The author stated that in the deliberations of the Preparatory Committee on the Stockholm Declaration there was no reference at all to the question of the moral injury the victim state of transnational pollution might suffer in the form of a violation of its sovereignty, *ibid* 67); Also see, Henn-Jüri Uibopuu, 'The Internationally Guaranteed Right of an Individual to a Clean Environment' (1977) 1 Comp. L. Y.B. 101, 105 (According to the author, Principle 21, "referring to material damage done to another State, does not refer to the territory of the polluting State and thus also not to its own inhabitants". Although both Handl and Uibopuu emphasized the element of "material damage" indicated in that Principle, this does not make both arguments the same. It is because, while Handl's limited observation with respect to responsibility emanates from the damage given to another State, Uibopuu went further and added that provision does not cover the damage occurred in the polluting State. It is clear that the very purpose of Principle 21 was to formulate the former, i.e. refraining from given transboundary harm. But it may be possible to argue that the same Principle also implies a duty and consequently responsibility imposed on a State not to harm its own inhabitants).

16 Richard B. Bilder, 'The Role of Unilateral Action in Preventing Environmental Injury' (1981) 14 (1) Vand. J. Transnat'l L. 51, 64 (With regard to burden of proof, the author commented that this issue may be particularly relevant where the law is unclear, as may often be the case in the developing field of international environmental law. The more permissive view, which appears more widely supported, would in theory tend to buttress and encourage unilateral environmental action in such cases; the argument being that a state may do anything that international law does not specifically forbid, *ibid* 66); Compare this argument, (*Colombia v. Peru)* [1950] ICJ Rep 276-277; But also see, Individual Opinion of Judge Alvarez appended to "*Fisheries* (*United Kingdom v. Norway*)" [1951] ICJ Rep 145, 152 (Judge Alvarez stated that "any State alleging a principle of international law must prove its existence; and one claiming that a principle of international law has been abrogated or has become ineffective and requires to be renewed, must likewise provide proof of this claim").

17 Robert E. Stein, 'The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settlement' (1985) 12 (2) Syracuse J. Int'l L. & Com. 283, 284 (The author drew attention to the fact that Principle 21 was based on the 1963 Limited Test Ban Treaty which contained similar language, *ibid*).

18 For example, see, Principles 3 and 6 of the European Economic Community "*Programme of Action on the Environment*" (16 O.J. EC (No. C 12/6), 1973; 20 O.J. EU (No. C 139), 1977; 26 O.J. EU (No. C 46), 1983).

19 For example, the 1974 OECD Council Recommendation C (74) 224 concerning "*Principles of Transfrontier Pollution*" (Annex, title B), reproduced in, 14 ILM 242 (1975) (This Recommendation stated, *inter alia*, that "Prior to the initiation in a country of works or undertakings which might create a significant risk of transfrontier pollution, this country should provide early information to other countries which are or may be affected"). Also see, the 1974 OECD Council Recommendation C (74) 220 on the "*Control of Eutrophication of Waters*", and Recommendation C (74) 221 on "*Strategies for Specific*

3129 (XXVIII) of December 1973 on "*Co-operation in the Field of Environment concerning Natural Resources Shared by Two or More States*"[20], it was indicated that sharing of such resources "must be developed on the basis of a system of information and prior consultation within the framework of the normal relations" existing between such States. For example, Section 5 of the OECD "*Final Act of the Conference on Security and Cooperation in Europe*" (Helsinki Final Act) of 01/08/1975 read as follows: "Each of the participating States, in accordance with the principles of international law, ought to ensure, in a spirit of co-operation, that activities carried out on its territory do not cause degradation of the environment in another State or in areas lying beyond the limits of national jurisdiction".

Article 30 of the UN "*Charter of Economic Rights and Duties of States*" of 12/12/1974 clearly provides that all States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[21] The United Nations "*World Charter for Nature*"[22] of 28/10/1982, under Section "III- Implementation", requires States, public authorities, international organizations, individuals, groups and corporations to "ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other states or in the areas beyond the limits of national jurisdiction", (para.21/d), and to "safeguard and conserve nature in areas beyond national jurisdiction", (para.21/e). The World Charter for Nature could not have legally binding force.[23] Furthermore, it "does not purport to have

Pollutants Control". The 1977 OECD Council Recommendation C (77) 28 (Final) on the "*Regime of equal access and non-discrimination in relation to transfrontier pollution*" of 17/05/1977, reproduced in, 16 ILM 977 (1977) (In the 1977 Recommendation it is stated, *inter alia*, that "the Country of origin, on its own initiative or at the request of an exposed Country, should communicate to the latter appropriate information concerning it in matters of transfrontier pollution or significant risk of such pollution and enter into consultations with it"); See, Dupuy (n 11) 64-65; Partan (n 6) 51-52, 84.

20 The UN General Assembly resolution 3129 (XXVIII) on "*Co-operation in the Field of Environment concerning Natural Resources Shared by Two or More States*" was adopted on 13/12/1973, (UN GAOR Supp. (No.30A), UN Doc. A/9030/Add.1, 1973) (This Resolution adopted by a vote 77 to 5, with 43 abstentions). Also see, Partan (n 6) 49 (According to the author "the lack of consensus on the 1973 resolution should not be understood as expressing disapproval of the duty to inform. Since the negative votes and the abstentions in 1973 were explained on other grounds, the vote on the 1973 resolution could be construed as in effect an endorsement of the duty to inform affected states of transboundary risks", *ibid*).

21 Also see, Article 29 of the 1974 "Charter of Economic Rights and Duties of States". Cf. the "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction" of 17/12/1970, (para.1). The 1970 'Declaration of Principles on the Sea-Bed" led to the adoption of the 1982 UN Convention on the Law of Sea.

22 The '*World Charter for Nature*' was adopted by the UN General Assembly resolution 37/7 on 28/10/1982 at its 48th plenary meeting; UN GAOR, 37th Sess., Supp. No.51, p.17, UN Doc.A/37/51 (1982). The vote was 111 to 1, with 18 abstentions. The only negative vote was the United States'.

23 Harold W. Wood, Jr., 'The United Nations World Charter for Nature: The Developing Nations' Initiative to Establish Protections for the Environment' (1985) 12 (4) Ecology L.Q. 977 (According to the author the Charter could not have any legally binding force, *ibid* 982. Numerous countries commented on the Draft Charter, one of which was Turkey: "Although the draft contains some general principles for nature conservation which have been taken from various international agreements such as the Stockholm Declaration and the World Conservation Strategy, nevertheless, the reaffirmation of these principles at the global level in a World Charter for Nature is of great importance for it will help to promote man's awareness of the need for preserving the natural balance and rational management of the environment as a whole") *ibid* 987. Further see, Partan, (n 6) 62; (Although the Charter uses the mandatory word 'shall', the principles fail to present a legally enforceable standard, *ibid* 983. One commentator noted that "the Charter does not specify which of its provisions embody or reflect legal obligation. It would therefore be difficult to conclude that the Assembly regarded the World

any greater legal effect than the Stockholm Declaration".[24] As was already noted in the "Introduction" part of this study, the 1982 'World Charter for Nature' seems to recognize a non-utilitarian approach (Preamble).

The UN General Assembly in its resolution 44/207 of 22/11/1989 on "*Protection of global climate for present and future generations of mankind*"[25] reaffirms that, in accordance with the Charter of the United Nations and the principles of international law, States have the sovereign right to exploit their own resources in accordance with their environmental policies. It also reaffirms their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction and to play their due role in preserving and protecting the global and regional environment in accordance with their capacities and specific responsibilities (para.4). In the same line, the UN General Assembly resolution 44/224 of 22/12/1989 on "*International cooperation in the monitoring, assessment and anticipation of environmental threats*"[26] confirms the same principles (para.4).

The UN International Law Commission (ILC) also dealt with environmental questions in the course of its codification work on a draft code of crimes against the peace and security of mankind, on the law of non-navigational uses of international watercourses, and on international liability for injuries and their consequences arising out of acts not prohibited by international law. As early as 1976, the ILC suggested that a State's "serious breach of an international obligation of essential importance for safeguarding and preservation of the human environment" violates principles that "have become particularly essential rules of general international law".[27]

Charter's notice provisions as obligatory").

24 Marc Pallemaerts, 'International Environmental Law From Stockholm to Rio: Back to the Future?' in Philippe Sands '*Introduction*' (ed) *Greening International Law* (The New Press 1994) 1, 3.

25 The UN General Assembly resolution 44/207 on "*Protection of global climate for present and future generations of mankind*" was adopted on 22/11/1989 at its 85th plenary meeting.

26 The UN General Assembly resolution 44/224 on "*International cooperation in the monitoring, assessment and anticipation of environmental threats and in assistance in cases of environmental emergencies*" was adopted on 22/12/1989 at its 85th plenary meeting. In this resolution the General Assembly reaffirms that, in accordance with the UN Charter and the principles of international law, "States have the sovereign right to exploit their own resources in accordance with their environmental policies". The same resolution also reaffirms the responsibility of States "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, as well as to play their due role in preserving and protecting the global and regional environment in accordance with their capacities and specific responsibilities", para 4.

27 *Report of the ILC on the work of its 28th session*, *Draft Articles on State Responsibility*, Article 19, UN GAOR, Thirty-first session, Supp. No.10 (A/31/10) (1976); *Report of the ILC on the work of its 32nd session*, UN GAOR, Thirty-fifth session, Supp. No.10 (A/35/10) (1980); *Report of the ILC on the work of its 42nd session*, UN GAOR, Frothy-fifth session, Supp. No.10 (A/45/10) (1990); *Report of the ILC on the work of its 48th session*, UN GAOR, Fifty-first session, Supp. No.10 (A/51/10) (1996); Daniel Barstow Magraw, 'Transboundary Harm: The International Law Commission's Study of International Liability' (1986) 80 (2) AJIL 305; Francesco Francioni, 'Legal Aspects of Mineral Exploitation in Antarctica' (1986) 19 (2) Cornell Int'l L.J. 163, 175; Stephen C. McCaffrey, 'The Work of the International Law Commission Relating to Transfrontier Environmental Harm' (1988) 20 (3) N.Y.U. J. Int'l L & Pol. 715; Alan E. Boyle 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 (1) 1; Peter H. Sand, 'International Law on the Agenda of the United Nations Conference on Environment and Development Towards Global Environmental Security' (1991) 60 (1) Nordic J. Int'l L. 5, 9; Kenneth F. McCallion, 'International Environmental Justice: Rights and Remedies', (2003) 26 (3) Hastings Int'l & Comp. L. Rev. 427, 430-431.

Principle 2 of the 1992 'Rio Declaration' imposes a general duty upon States with respect to prevention of transboundary damage. In the latter Principle it is stated that

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and *the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*." (Emphasis added).

Consequently, this principle indicates the duty of States not to cause damage to areas beyond national jurisdiction. In view of Sanwal, "while the Stockholm Declaration was concerned with the conflict between the sustainable use of natural resources and transboundary pollution, twenty years later the understanding of both the content and the context of human interference with the ecosystem has changed. The policy focus is no longer the apprehension that environmental considerations will restrict the right of states to exploit their natural resources but the impact on sovereignty of restrictions over activities affecting the natural environment. With the widening scope of accepted restrictions, sovereignty is acquiring a new meaning. The restrictions affect a range of economic activities from those likely to cause irreversible environmental damage to those maintaining an open and fair trading system".[28]

Some states fear that Principle 2 of the Rio Declaration, akin to Principle 21 of the Stockholm Declaration, may lead to an overwhelming liability for all parties to a conflict.[29] The Rio Declaration has expanded the scope of compensation for transboundary pollution to include environmental damages in addition to damages incurred by victims and their property. Legal liability as an economic instrument for environmental protection, by placing a price on polluting activities, will promote preventive measures in a setting of uncertainty.[30]

ii. The principle with respect to nature, including marine, conservation

The principle not to cause (transboundary) environmental harm can be found in binding instruments.

28 Mukul Sanwal, 'Sustainable Development, the Rio Declaration and Multilateral Cooperation' (1993) 4 (1) Colo. J. Int'l Envtl. L. & Pol'y 45, 51.

29 Rymn James Parsons, 'The Fight to Save the Planet: U.S. Armed Forces, "Greenkeeping", and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict' (1998) 10 (2) Geo. Int'l Envtl. L. Rev. 441, 456 (The author added: "Interpreted literally, this language imposes responsibility for environmental damage during armed conflict even when such damage is justified under the law of armed conflict and humanitarian law, and imposes responsibility for incidental damage to global resources beyond the jurisdiction of individual states. Many states are wary of exposing themselves to this type of liability and would therefore object to the recognition of these provisions as customary international law").

30 Sanwal (n 28) 59.

For instance, in the preambular paragraph 3 of the "*Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*"[31] (London Dumping Convention) of 29/12/1972, it was emphasized that States have, in accordance with the Charter of the UN and the principles of international law, sovereign right to exploit their own resources pursuant to their own environmental policies and "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[32]

Article 6, paragraph 3, of the UNESCO "Convention for the Protection of the World Cultural and Natural Heritage" of 23/11/1972 provides that "each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention." This provision implies the recognition of no transboundary harm principle, the latter of which was expressly formulated in Principle 21 of the 1972 Stockholm Declaration with regard to environmental protection.

Under Part XII of the United Nations "Convention on the Law of the Sea" (UNCLOS) of 10/12/1982 Article 192 provides a general obligation that "States have the obligation to protect and preserve the marine environment". However, Article 193 states that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". Article 194, paragraph 2, of the UNCLOS requires States to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond areas where they exercise sovereign rights in accordance with this Convention".[33] Thus, the formulation set forth in Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 also appears in the provisions of the UNCLOS of 1982.

31 The "*Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*" was adopted on 13/11/1972, by the Intergovernmental Conference on the Convention on the Dumping of Wastes at Sea, London, 30 October-13 November 1972, signed on 29/12/1972 and entered into force on 30/08/1975. It is reproduced in 11 ILM 1294 (1972) and 67 (3) AJIL (July, 1973) 626-636. Article I of this Convention reads: "Contracting Parties shall individually and collectively promote the effective control of all sources of pollution of the marine environment, and pledged themselves especially to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea".

32 Preambular paragraph 4 of the 1972 "London Dumping Convention" referred to the 1970 "Declaration of Principles on the Sea-Bed" adopted by the UN General Assembly resolution 2749 (XXV) on 17/12/1970.

33 Pursuant to Article 194, paragraph 1, of the UNCLOS, States are under obligation to prevent, reduce and control pollution "using for this purpose the best practicable means at their disposal and in accordance with their capabilities". Furthermore, in accordance with Article 195, in taking measures to prevent, reduce and control pollution of the marine environment, "States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another".

Pursuant to Article 20 of the ASESAN "*Agreement on the Conservation of Nature and Natural Resources*" of 09/07/1985, the Parties recognize their international responsibility in regard to transfrontier environmental effects and undertake to avoid and reduce adverse environmental effects of activities under their jurisdiction.

Article 4 (General Provisions), paragraph 6, of the "Noumea Convention" of 24/11/1986 (which entered into force on 22/08/1990) provides that "nothing in this Convention shall affect the sovereign right of States to exploit, develop and manage their own natural resources pursuant to their own policies, taking into account their duty to protect and preserve the environment. Each Party shall ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction".

In the same line Article 3 of the "Convention on Biological Diversity" of 05/06/1992 provides that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

Article 5, paragraph (c), of the ECE "Protocol on Water and Health" of 17/06/1999 indicates the following standard as one of the guiding principles: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

In preambular paragraph 6 of the 2003 "(Revised) African Convention on the Conservation of Nature and Natural Resources" the Parties reaffirm that States have, in accordance with the Charter of the United Nations and the principles of international law, a sovereign right to exploit their own resources pursuant to their environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The "International Tropical Timber Agreement" adopted on 27/01/2006, which is the successor to the 1994 Agreement, in preamble para. d repeats the same principle in identical words.

Article 11 of the "Convention to Combat Desertification"[34] (UNCCD) of 17/06/1994, which deals with sub-regional and regional action programs, provides

34 The "*United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*" was adopted on 17/06/1994 and entered into force on 26/12/1996; *reproduced in*, 33 ILM 1328 (1994).

that such co-operation may include "agreed joint programmes for the sustainable management of transboundary natural resources, scientific and technical co-operation, and strengthening of relevant institutions". In Article 11 of Annex I (regional implementation for Africa), it is stated that the Parties are required to establish mechanisms for the management of shared natural resources, in which it is stated that such mechanisms might effectively handle transboundary problems associated with desertification and/or drought. Article 5, paragraph 3, of Annex II (regional implementation for Asia) to the UNCCD indicates that agreed joint programs for the sustainable management of transboundary natural resources relating to desertification may be included into sub-regional or joint action programs.

Article 5, paragraph 1, of the UN "Convention on the Law of the Non-navigational Uses of International Watercourses"[35] of 21/05/1997 imposes a duty upon watercourse States to utilize an international watercourse in an equitable and reasonable manner by taking into account the interests of other watercourse States. In that connection, the factors and circumstances to be taken into account include, *inter alia*, ecological factors, the social and economic needs of other States, and the effects of the use of watercourses in one watercourse State on the other watercourse States (Article 6/1,a, b and d). Pursuant to Article 7, paragraph 1, of the Convention, watercourse States are also required to take all appropriate measures to prevent the causing of significant harm to other watercourse States. The same prevention, reduction and control of pollution that may cause significant harm to other watercourse States is further emphasized in Article 21, paragraphs 2 and 3.[36]

iii. The principle with respect to atmospheric pollution

In this context Article IV of the "ENMOD Convention"[37] of 18/05/1977 may be cited as one of the earliest examples. The substance of the 1977 Convention was reasserted in very general terms in the subsequent conventions.[38] There is a rich

35 The "*Convention on the Law of the Non-navigational Uses of International Watercourses*" was adopted by the UN General Assembly Resolution 51/229 on 21/05/1997 and entered into force on 17/08/2014.

36 Further see, Article 22 (Introduction of alien or new species) and Article 27 (Prevention and mitigation of harmful conditions) of the Convention on Non-navigational Uses of International Watercourses of 21/05/1997.

37 The "*Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*" was opened for signature on 18/05/1977 and entered into force on 05/10/1978. Article IV of the ENMOD Convention reads as follows: "Each State Party to this Convention undertakes to take any measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control".

38 Further see the following instruments: **(i)** Pursuant to Article VII of the "*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*" of 27/01/1967 "Each State Party… that launches or procures the launching of an object into outer space… and each State Party from whose territory or facility an object is launched, is *internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons* by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies". Furthermore, Article IX provides, *inter alia*, that "States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as *to avoid their harmful contamination and also adverse changes in the environment of the Earth* resulting from the introduction of

literature on the issue.[39]

Preamble paragraph 2 of the Vienna "*Convention for the Protection of the Ozone Layer*" of 22/03/1985 declared that the Parties recalled "the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, and in particular principle 21, which provides that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

Preambular paragraph 8 of the 1992 UN "*Framework Convention on Climate Change*" (UNFCCC) reads as follows: "States have... in accordance with the Charter of the United Nations and the principles of international law, the (...) responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

While preambular paragraph 5 of the ECE "*Convention on Long-range Transboundary Air Pollution*" of 13/11/1979 (entered into force on 16/03/1983)

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extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose" (Emphasis added); Also see, John M. Kelson, 'State Responsibility and the Abnormally Dangerous Activity' (1972) 13 (2) Harv. Int'l. L. J. 194, 214-215. **(ii)** While Article 3, paragraph 3, of the "*Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*" of 18/12/1979 requires States Parties not place in orbit around or other trajectory to or around the Moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or not place or use such weapons on or in the Moon, paragraph 4 of the same Article forbids the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on the Moon. Furthermore, pursuant to Article 7, paragraph 1, of the 1979 Agreement, "in exploring and using the Moon, States Parties shall take measures to *prevent the disruption of the existing balance of its environment*, whether by introducing adverse changes in that environment, by its harmful contamination through the introduction of extra-environmental matter or otherwise. States Parties shall also take measures to *avoid harmfully affecting the environment of the Earth through the introduction of extraterrestrial matter or otherwise*" (Emphasis added). **(iii)** Preambular paragraph 4 of the "*Principles Relevant to the Use of Nuclear Power Sources in Outer Space*", adopted by the General Assembly resolution 47/68 of 14/12/1992 provides that "the use of nuclear power sources in outer space should be based on a thorough safety assessment, including probabilistic risk analysis, with particular emphasis on reducing the risk of accidental exposure of the public to harmful radiation or radioactive material". Pursuant to Principle 3 (Guidelines and criteria for safe use) "1- *General goals for radiation protection and nuclear safety:* (*a*) States launching space objects with nuclear power sources on board shall endeavour to protect individuals, populations and the biosphere against radiological hazards. The design and use of space objects with nuclear power sources on board shall ensure, with a high degree of confidence, that the hazards, *in foreseeable operational* or accidental *circumstances*, are kept below acceptable levels as defined in paragraphs 1 (*b*) and (*c*)." Principle 2 (Use of terms), paragraph 3, clarifies the terms: "For the purposes of principle 3, the terms 'foreseeable' and 'all possible' describe *a class of events or circumstances whose overall probability of occurrence is such that it is considered to encompass only credible possibilities* for purposes of safety analysis" (Emphasis added). Principle 4 (Safety assessment), paragraph 1, requires States "ensure that a thorough and comprehensive safety assessment is conducted".

39 In addition to the literature which has been already indicated (eg, Stephen Gorove, 'Freedom of Exploration and Use in the Outer Space Treaty: A Textual Analysis and Interpretation' (1971) 1 (1) Denv. J. Int'l L. & Pol'y 93; Joanne Irene Gabrynowicz, 'Space Law: Its Cold War Origins and Challenges in the Era of Globalization' (2004) 37 (4) Suffolk U. L. Rev. 1041; Rosanna Sattler, 'Transporting a Legal System for Property Rights: From the Earth to the Stars' (2005) 6 (1) Chi. J. Int'l. L. 23; Jijo George Cherian & Job Abraham, 'Concept of Private Property in Space: An Analysis' (2007) 2 (4) J. Int'l. Com. L. & Tech. 211; Sarah Coffey, 'Establishing a Legal Framework for Property Rights to Natural Resources in Outer Space' (2009) 41 (1) Case W. Res. J. Int'l. L. 119; Steven Freeland, 'The limits of law: challenges to the global governance of space activities' (2020) 153 (1) J. & Procee. R. S. New South Wales 70) in the "Part 1" of the present article, further see, Daniel A. Porras, 'The 'Common Heritage' of Outer Space: Equal Benefits for Most of Mankind' (2006) 37 (1) C. W. Intl. L. J. 143.

directly refers to Principle 21 of the 1972 "Stockholm Declaration", the next preambular paragraph notes "the existence of possible adverse effects, in the short and long term, of air pollution including transboundary air pollution". The Parties to the 1979 Convention undertake a general duty "to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution", (Article 2).[40]

In preamble paragraph 8 of the "*Protocol on Persistent Organic Pollutants*" of 24/06/1998, the Parties reaffirmed that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". An identical statement appears in preamble paragraph 9 of the "Protocol on Heavy Metals" of 24/06/1998, and in preamble paragraph 12 of the "*Protocol to Abate Acidification, Eutrophication and Ground-Level Ozone*"[41] of 30/11/1999.

In preambular paragraph 4 of the IAEA "*Convention on Early Notification of a Nuclear Accident*"[42] of 26/09/1986, "the need for States to provide relevant information about nuclear accidents as early as possible in order that transboundary radiological consequences can be minimized" is emphasized. In accordance with Article 1, paragraph 1, "this Convention shall apply in the event of any accident involving facilities or activities of a State Party or of persons or legal entities under its jurisdiction or control, …from which a release of radioactive material occurs or is likely to occur and which has resulted or may result in an international transboundary release that could be of radiological safety significance for another State". With regard to duty to inform Article 2 provides that, in the event of a "nuclear accident", the State Party concerned shall "forthwith notify… those States which are or may be physically affected… of the nuclear accident, its nature, the time of its occurrence

40 Pursuant to Article 1, paragraph (b), of the "Convention on Long-range Transboundary Air Pollution" of 13/11/1979, the phrase 'Long-range transboundary air pollution' means "air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources".

41 The "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone*", adopted on 30/11/1999 and entered into force on 17/05/2005; available at, http://www.unece.org/env/lrtap/pops

42 The IAEA "*Convention on Early Notification of a Nuclear Accident*", adopted by the General Conference at its special session, 24-26/09/1986, and opened for signature in Vienna on 26/09/1986 and in New York on 06/10/1986. It entered into force on 27/10/1986; *reproduced in*, 25 ILM 1370 (1986). Article 5 specifies the information to be provided. But Article 5/3 undermines the effectiveness of the Convention by allowing a notifying party to restrict another party's use of its information to the detriment of the health of the receiving party's citizens. Article 11 provides dispute settlement procedure with respect to disputes concerning interpretation and application of this Convention, which includes the possibility that the case may be submitted to the arbitration or referred to the ICJ; See, Melanie L. Oxhorn, 'The Norms of Nuclear Accidents after Chernobyl' (1992-1993) 8 (2) J. Nat. Resources & Envtl. L. 375, 387-388, 390.

and its exact location where appropriate", and shall promptly provide affected States with available information to minimize the radiological consequences in those States.[43] In that context one may also refer to the "*Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*" of 26/09/1986.[44] Those two conventions were elaborated following the Chernobyl incident and they entered into strict force in a very short period of time. The seriousness and wide adverse transboundary effects of the disaster would result in a broad adherence to these treaties.

Indeed, at the time of the Chernobyl accident no multilateral treaty requiring the provision of prompt and detailed information was in existence, neither for general air-carried pollution nor specifically for radioactive materials. Furthermore, although the Vienna Convention on Civil Liability for Nuclear Damage, which provides absolute liability for operators of nuclear plants that cause transboundary harm, was opened to signature on 21/05/1963, the Soviet Union was not a party to that Convention.[45] However, the impact of the IAEA's aforementioned two post-Chernoblyl Conventions of 1986 on actual nuclear safety was limited since they were concerned merely with the aftermath of nuclear accidents, not with their prevention.[46]

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43 Also see, the "*Treaty Establishing the European Atomic Energy Community*" (EURATOM) of 25/03/1957, 298 UNTS 167. Article 37 of the EURATOM provides for a regulatory system for planning for the disposal of radioactive waste, including the provision of information by Member States to the Commission, such as general data relating to any plan for the disposal of radioactive waste in whatever form in order to determine whether the implementation of such a plan is liable to result in the radioactive contamination of water, soil or airspace of another Member State; See, Malgosia Fitzmaurice, 'OSPAR Tribunal: Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)' (2003) 18 (4) Int'l J. Marine & Coastal L. 541, 543.

Further see, the European Communities legislation, for example: **1.** (87/600/Euratom): Council Decision of 14/12/1987 on "*Community arrangements for the early exchange of information in the event of a radiological emergency*", [1987] OJ L 371/76). (It established a framework for notification and provision of information to be used by the Member States in order to protect the general public in case of a radiological emergency). **2.** (89/618/Euratom): Council Directive of 27/11/1989 on "*Informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency*" [1989] OJ L 357/31). (It imposed obligations on the Member States to inform the general public in the event of a radiological emergency. While Article 5, paragraph 1, of Directive 89/618 states that "Member States shall ensure that the population likely to be affected in the event of a radiological emergency is given information about the health-protection measures applicable to it and about the action it should take in the event of such an emergency", paragraph 3 of the same Article provides the following: "This information shall be communicated to the population … without any request being made"). **3.** Commission communication on the "*Implementation of Council Directive 89/618/ Euratom of 27 November 1989 on informing the general public about health protection measures to be applied and steps to be taken in the event of a radiological emergency*", [1991] OJ C103/12). **4.** (97/43/Euratom): Council Directive of 30/06/1997 on "*Health protection of individuals against the dangers of ionising radiation in relation to medical exposures, and repealing Directive 84/466/Euratom*", [2009] OJ L 180/22). **5.** (2009/71/Euratom): Council Directive of 25/06/2009 "*Establishing a community framework for the nuclear safety of nuclear installations*", [2009] OJ L172/18). Article 8 of 2009/71 Directive provides the following: "Member States shall ensure that information in relation to the regulation of nuclear safety is made available to the workers and the general public. This obligation includes ensuring that the competent regulatory authority informs the public in the fields of its competence. Information shall be made available to the public in accordance with national legislation and international obligations, provided that this does not jeopardise other interests such as, *inter alia*, security, recognised in national legislation or international obligations".

44 The "*Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*", adopted on 26/09/1986; *reproduced in*, 25 ILM 1377 (1986).

45 Oxhorn (n 42) 376. The Soviet Union refused to pay any compensation for the Chernobyl incident, *ibid* 382-386.

46 Menno T. Kamminga, 'The IAEA Convention on Nuclear Safety' (1995) 44 (4) ICLQ 872, 874; Also see, Manfred Lachs, 'The Challenge of the Environment' (1990) 39 (3) ICLQ 663, 667. "Existing customary law and general principles do not seem to cover the issue of the operation of nuclear power stations and other nuclear devices… Following the Chernobyl disaster, two conventions were concluded in 1986 which constitute an important step forward. One provides for the obligation to notify as soon as possible all parties concerned and the other regulates questions of assistance in cases of

In preambular paragraph 10 of the "*Stockholm Convention on Persistent Organic Pollutants*"[47] ("Stockholm Convention on POPs") of 22/05/2001 the Parties reaffirm that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

iv. The principle in international jurisprudence

With regard to the obligation not to cause damage by transfrontier pollution, in addition to examples of the above-mentioned provisions of both soft and hard law instruments, there is an increasing case-law produced by various judicial organs.

a. The Trail Smelter arbitration

In the well-known and frequently cited "*Trail Smelter Arbitration* (*USA v. Canada*)"[48] case[49] which involved transnational pollution by air, Canada was held responsible for the damage in the United States that resulted from fumes emitted in British Columbia and deposited in the area of Washington State. In the second phase of the case the Arbitral Tribunal in its decision[50] of 11/03/1941 laid down a general rule that "under the principles of international law, as well as the law of the United States, *no State has the right to use or permit the use of its territory in such a manner as to cause injury* by fumes *in or to the territory of another* or the property of persons therein, when the case is of *serious consequence* and the injury is established by clear and convincing evidence".[51] (Emphasis added). Basing on this determination

accidents. In view of the secrecy surrounding some nuclear installations, possible access to energy reactors may pave the way to more effective control".

47 The "*Stockholm Convention on Persistent Organic Pollutants*", adopted at Stockholm on 22/05/2001, opened to signature on 23/05/2001, and entered into force on 17/05/2004; available at, <http://treaties.un.org>. The 2001 Stockholm Convention seeks to protect human health and the environment from the risks posed by POPs. The Convention reflects the international community's support for a risk-based approach to reducing or eliminating the potential impacts of listed POP chemicals. See, Paul E. Hagen and Michael P. Walls, '*The Stockholm Convention on Persistent Organic Pollutants*' (2005) 19 (4) Natural Resources & Environment 49.

48 "*Trail Smelter Case* (*USA v. Canada*)", Decision of the Tribunal of 11/03/1941, see, U.N. Reports International Arbitration Awards 1945, 1905; *reproduced in*, '*Trail Smelter Arbitral Tribunal - Decision*' [1941] 35 (4) AJIL 684.

49 On this case, for example see, John E. Read, 'The Trail Smelter Dispute' (1963) 1 Canadian YBIL 213-229; George A. Rempe, 'International Air Pollution' (1968) 10 Ariz. L. Rev. 138, 142; Alfred P. Rubin, 'Pollution by Analogy: The Trail Smelter Arbitration' (1971) 50 (3) Oregon L. Rev. 259; Cecil J. Olmstead, 'Prospects for Regulation of Environmental Conservation under International Law', in Maarten Bos (ed.) The Present State of International Law (Kluwer, The Netherlands 1973) 245, 247; Handl (n 15) 60-63; Jerome B. Elkind, 'Footnote to the Nuclear Test Cases: Abuse of Right - A Blind Alley for Environmentalists' (1976) 9 (1) Vand. J. Transnat'l L. 57, 91-94; Sanford E. Gaines, 'International Principles for Transnational Environmental Liability' (1989) 30 (2) Harv. Int'l L. J. 311, 337-339; Karin Mickelson, 'Rereading Trail Smelter' (1992) 31 Canadian YBIL 219.

50 Trail Smelter Case (n 48) 716.

51 Read (n 49) 220; Alexandre Kiss and Dinah Shelton, 'Guide to International Environmental Law' (Martinus Nijhoff Publishers 2007) 19; Further see, Stephen C. McCaffrey, 'Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation Between Canada and United States' (1973) 3 (2) Cal. W. Int'l L. J. 191, 220 "The Trail Smelter Arbitration Tribunal, in determining the rights and liabilities of the United States and Canada in international law for

the tribunal's answer to the question whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and if so to what extent, was as follows: "So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through the fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals".[52] As was already stated in the "Introduction" of this study, a significant role has been played by the International Joint Commission created by the "Treaty relating to the Boundary Waters between the US and Canada"[53] of 11/01/1909 in the *Trail Smelter* case.

The importance of the *Trail Smelter* decision clearly lies in its uniqueness in laying down principles of liability for transnational air pollution.[54] Some authors argue that this decision has become the leading case on state liability for acts that cause damage across transnational boundaries. "Principle 2 of the (Rio) Declaration is clearly consistent with this decision, which sought to place rational, environmentally-sensitive limits on the wealth acquisition process."[55] According to Weiss, one of the most important aspects of the Arbitration is the Tribunal's decision that if there is a threat of serious continuing harm, the State must cease the harmful conduct (which implies that damages would not be sufficient). The Tribunal required the parties to effectuate a monitoring regime to ensure that further damaging pollution did not occur.[56]

But looking at the case from another perspective Gaines argued that this case exemplified for complexity of determining causal relationships between pollution and changes in environmental quality or personal health. "International liability law cannot rely on a system that requires six years of fact-finding, including original scientific studies, to resolve a relatively simple transboundary damage claim. The transaction costs limit international adjudication to extreme cases and perhaps only to disputes between countries that can afford the diversion of funds into such a process. A relaxed standard for proof of causation would simplify the factual inquiry and reduce transaction costs significantly". [57] According to Schachter, "the choice

injuries to United States citizens from a Canadian smelter, relied upon cognate interstate controversies which had been decided by the United States Supreme Court".

52 Trail Smelter Case (n 50); see; 3 U.N. Reports International Arbitration Awards 1945, 1965; *reproduced in*, "*Trail Smelter Arbitral Tribunal - Decision*", [1941] 35 AJIL 716.

53 The "*Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary Between the United States and Canada*" of 11/01/1909.

54 Handl (n 15) 60.

55 John Batt & David C. Short, 'The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development' (1993) 8 (2) J. Nat. Resources & Envtl. L. 229, 264.

56 Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 Geo. L. J. 675, 677.

57 Gaines (n 49) 338-339.

of dispute-settlement procedures cannot ignore practical factors, including costs of protracted proceedings. The *Trail Smelter* case, for instance, involved about six years of fact finding and scientific studies in addition to lengthy hearings. In this respect, *Trail Smelter* would not be a model for future acts. It reminds us that if international liability is to perform an effective role, the conditions and procedures for determining responsibility have to avoid the heavy transaction costs of international governmental adjudication".[58]

Since the *Trail Smelter Arbitration* is a rare example of international environmental adjudication in this early period, it has acquired an unusually important place in the jurisprudence of international environmental law.[59] Although there are arguments that *Trail Smelter* remains the "landmark arbitral decision" with regard to international liability for transborder environmental injury[60], which recognizes that principles of state responsibility are applicable in the field of transfrontier pollution, and consequently states may be held liable to private parties or other states for pollution that causes significant damage to persons or property[61], there are many warnings about the misuse of the *Trail Smelter* which tend to focus on its invocation as support for the existence of customary duties to avoid causing transboundary environmental damage and to make reparation for such damage should it occur.[62] Some authors also, who referred to *Trail Smelter* as a "much cited, and with regard to its international legal relevance also often overestimated, decision"[63], argued that "the result in the form of general principles of international law is less than one might have expected, The only certain conclusion inferable from the tribunal's holding is, that under international law a state has to tolerate the consequences of the activities of another state affecting its territory which are lawful *per se* so long as these extraterritorial effects do not amount to an injury and the case is not of serious consequence". This decision also remains inconclusive as to the question of moral injury.[64]

Furthermore, the test criteria, namely that of "serious consequence" and that of the injury being "established by clear and convincing evidence", used by the Tribunal have been criticized as they may allow the polluter to continue in polluting activities in so far they may not cause 'serious' damage, which is measurable in monetary terms,

58 Schachter (n 12) 481-482; Also see, Kiss and Shelton (n 51) 84 (The authors draw attention to a long period required in interstate environmental litigation as appeared in the *Trail Smelter* case which began with the claims presented by pollution victims in 1926 and concluded with a final arbitral award in 1941).

59 Weiss (n 56) 677.

60 Schachter (n 12) 480.

61 Kiss and Shelton (n 51) 19.

62 Mickelson (n 49) 220.

63 Günther Handl, 'Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited' (1976) 3 Canadian YBIL 156, 167.

64 Handl (n 15) 61 (With regard to question of prospective damage, the author argued that "provided the strict requirements of evidence as to the probability and not mere possibility of future material damage can be met, there is no reason why a claim for a judgment declaring the pollution generating activity unlawful to the extent of its expected extraterritorial impact should not succeed in an international tribunal", *ibid* 75).

to the industrial or agricultural production of a second State.[65] The "precedential value" of the *Trail Smelter*, in view of some commentators is limited due to specific circumstances that surround both the decision to submit the dispute to arbitration and the decision of the Tribunal. Canadian liability for the damage in the state of Washington had already been acknowledged by the Convention (signed at Ottawa on 15/04/1935) constituting the Arbitral Tribunal. Furthermore, the Arbitral Tribunal was required to apply both international law and the law of the US with regard to the question of whether damage had occurred and to the measure of compensation payable by Canada.[66]

On the other hand, the *Trail Smelter* case is also significant regarding the effective use of experts (scientists), which was provided in Article II. Each party designated one expert who was present at all hearings, heard all witnesses and the arguments, examined all the documents, inspected the smelter, the site of the scientific experiments and the areas of alleged injury, and who was always available to the Tribunal for consultation and advice in deliberation. Furthermore, at the end of the presentation of evidence and argument, the Tribunal found it necessary to make further investigations. Consequently, the Tribunal appointed the same experts as Technical Consultants, who were in a position to administer during the experimental period and to conduct their own investigations.[67]

b. The Lake Lanoux arbitration

The *Lake Lanoux Arbitration* (France v. Spain) (Arbitral Tribunal award of 16/11/1957)[68] concerned the use of the waters of Lake Lanoux in the Pyrenees. The French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of May 26, 1866, between France and Spain and the Additional Act of the same date. In any event, it was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties, (p.1). The Tribunal found that the French scheme complied with the obligations of Article 11 of the Additional Act, (p.34). The Tribunal decided that in carrying out works for the utilization of the waters of Lake Lanoux without prior agreement between the two Governments, in the conditions mentioned in the Scheme for the Utilization of the Waters of Lake

65 Rubin (n 49) 272; Mickelson (n 49) 222.

66 Handl (n 63) 168; Mickelson (n 49) 223; Further see, Rubin (n 49) 259 (According to the author, "such heavy reliance on a single precedent breeds overstatement as analysts attempt to reinterpret the case to fit various hypothetical circumstances and new cases").

67 Read (n 49) 225-226; Gaines (n 49) 338; Mickelson (n 49) 232.

68 "*Lake Lanoux Arbitration* (*France v. Spain*)", Arbitral Tribunal award of 16/11/1957; 12 R.I.A.A. 281 (1957); available at, <www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-143747E.pdf>; *reproduced in*, 24 ILR 101; (1959) 53 (1) AJIL 156.

Lanoux, the French Government was not committing a breach of the provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date, (p.35). According to the Tribunal, "it has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters". Furthermore, "the technical guarantees for the restitution of the waters are as satisfactory as possible" and "if, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional", (p.19).

The Arbitral Tribunal "while taking a traditional view of international law regulating relations between neighbouring States, alluded to the possibility of natural resources such as the water of a lake being exploited 'in the common interests of everybody'…"[69] Some authors stressed the existence of a "strong consensus among international lawyers that riparian states should agree to share fairly the waters of international rivers among their co-riparian states to counter the historic practice reaffirmed in the Lake Lanoux Arbitration".[70] The general principles of international law do indicate the duty of a state not to engage in or permit conduct within its territory which would result in environmental injury outside its territory.[71]

The Tribunal held that a State whose actions may affect another State "has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the State", (p.33). The *Lake Lanoux Arbitration* may be read as establishing the principle that a State has the duty to give notice when its actions may impair the environmental enjoyment of another State.[72]

On the other hand, the *Lake Lanoux Arbitration* is also significant as it emphasizes the obligation to seek agreement in good faith. The Arbitral tribunal stated that "consultations and negotiations between the two States must be *genuine,* must comply with the rules of *good faith* and must *not be mere formalities*."[73] This pronouncement

69 Antonio Cassese, International Law (2nd edition, Oxford University Press 2005) 485.

70 A. Dan Tarlock and Patricia Wouters, 'Are Shared Benefits of International Waters an Equitable Apportionment?' (2007) 18 Colo. J. Int'l Envtl. L. & Pol'y 523, 525.

71 Olmstead (n 49) 247; Further see, Elkind (n 49) 94-96

72 Cf, Robert P. Barnidge Jr., 'The Due Diligence Principle under International Law' (2006) 8 (1) Int'l Comm. L. Rev. 81, 106-108 (According to the author, the Tribunal "did engage in a limited discourse that informs an understanding of the due diligence principle, particularly in the context of possible transboundary environmental harm", *ibid* 108).

73 Lake Lanoux Arbitration (n 68) 16 (The Arbitral tribunal further stated the following: "…The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers… are not irreconcilable with the interests of another State", *ibid* 16-17. "…the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and *sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally-, in cases of violation of the rules of good faith*", *ibid* 23. "In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an

was in line with the "*Tacna-Arica Arbitration*" of 1925.

> In the "*Tacna-Arica Arbitration*" case[74] the subject matter of the dispute was whether a plebiscite should be held over the attribution of the provinces of Tacna and Arica, the disputed territory between Chile and Peru which had been placed under Chilean jurisdiction for 10 years from the date of the ratification of the Treaty of Ancon of 20/10/1883 and whose attribution was to be decided by a plebiscite after the expiration of the period. By a Special Agreement of 20/07/1922, the two countries submitted the controversy to arbitration.[75] The arbitrator, Calvin Coolidge, rendered his award on 04/03/1925.[76] The arbitrator found that the parties were under an obligation to negotiate in good faith for the implementation of the plebiscite clause, but that neither party acted in bad faith in the delay of the plebiscite.[77] The arbitrator further stated that "the failure to agree upon a special protocol fixing the conditions of the plebiscite cannot therefore be regarded as being in itself a breach of the treaty. The parties, by Article 3 of the Treaty of Ancon, having left to a future agreement the conditions of the plebiscite must be deemed to have thereby agreed that each party should have the right to make proposals, and to object to the other's proposals, so long as they acted in good faith…"[78]

increasingly comprehensive basis. International practice reflects the conviction that *States ought to strive to conclude such agreements*: there would thus appear to be *an obligation to accept in good faith* all communications and contracts which could, by a broad comparison of interests and *by reciprocal good will, provide States with the best conditions for concluding agreements*", *ibid* 24. "In order for negotiations to proceed in a favourable climate, *the Parties must consent to suspend the full exercise of their rights during the negotiations*. It is normal that they should enter into engagements to this effect. If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed…", *ibid* 28) (Emphasis added).

74 In the "*Tacna-Arica Arbitration*" arbitration of 1925, a dispute arose between Chile and Peru as to the Northern and Southern boundary of the territory covered by Article 3 of the Treaty of Ancon of 20/10/1883. The Treaty provided for an ultimate plebiscite to determine sovereignty over the territory in question. Chile contends that the treaty established a river line, that is the river Sama from its source to its mouth, that treaty of Ancon dealt with the Peruvian provinces of Tacna and Arica and with a portion of another Peruvian province, of Tarata. In the view of Peru, Article 3 dealt only with the provinces of Tacna and Arica, the province of Tarata is not included. The problem arose as regards the river line, because there was no such river line as the treaty described. For a summary of the case, see, '*Summary of Decisions by International Tribunals including Arbitral Awards*', available at, <http://www.fao.org/docrep/005/w9549e/w9549e07.htm>.

75 The texts of the "*Protocol of Arbitration of the Tacna-Arica Dispute*" and "*Supplementary Act*" of 20/07/1922, *reproduced in*, (1923) 17 (1) Supplement AJIL 11. Further see, James Brown Scott, '*The Tacna-Arica Arbitration*' (1923) 17 (1) AJIL 82, 89 ("The conference resulted on July 20, 1922 in a protocol of arbitration and a supplementary act defining the scope of the arbitration. The protocol provides that the difficulties arising out of the unfulfilled provisions of the treaty of peace of October 20, 1883 shall be submitted to the arbitration of the President of the United States of America for final decision. The supplementary act provides that the arbitrator shall determine whether a plebiscite shall be held and, if this question is decided in the affirmative, the arbitrator shall have full power to determine the conditions for holding the plebiscite. If the decision of the question is in the negative, Chile and Peru agree to further discussions of the situation and, in the event that no direct agreement is then reached, the two governments agree to request the good offices of the United States in order to reach an agreement").

76 "*Tacna-Arica Arbitration*", Reports of International Arbitral Awards II 921; For the text of the Opinion and Award of the Arbitrator, also see, (1925) 19 (2) AJIL 393; Further see, '*In the Matter of the Tacna-Arica Arbitration: Memorial of Peru, Ruling and Observations of the Arbitrator, Appointment of Peruvian Member of Plebiscitary Commission*' (1925) 19 (3) AJIL 633; Quincy Wright, '*Tacna-Arica Arbitration*' (1925) 10 (1) Minn. L. Rev. 28.

77 The arbitrator stated the following: "It has not been contended that the plebiscite should have been held before the expiration of the ten-year period. The nature of the obligation imposed by Article **3** must be derived from its terms. Until the special agreement was made there could be no plebiscite. As the parties agreed to enter into a special protocol, but did not fix its terms, their undertaking was in substance to negotiate in good faith to that end, and it would follow that a willful refusal of either party so to do would have justified the other party in claiming discharge from the provision. But, as the parties did not in the treaty prescribe the conditions of the plebiscite and left these to be the subject of a future agreement, it is manifest that with respect to the negotiations looking to such an agreement they retained the rights of sovereign States acting in good faith…" See, '*Opinion and Award of the Arbitrator*' (n 76) 398.

78 '*Opinion and Award of the Arbitrator*' (n 76) 402 (With regard to substance of the award the arbitrator decided that "no part of the Peruvian province of Tarata is included in the territory covered by the provisions of Article 3 of the Treaty of Ancon; that the territory to which Article 3 relates is exclusively that of the Peruvian provinces of Tacna and Arica as they stood on 20/10/1883; and that the northern boundary of that part of the territory covered by Article 3 which was within the

It may be added that the principle to seek agreement in good faith was also underlined by the PCIJ in its Advisory Opinion of 15/10/1931 in the case of "*Railway Traffic between Lithuania and Poland*"[79] and by the ICJ in the cases of "*North Sea Continental Shelf*" Judgment of 20/02/1969[80], as well as in the cases of "*Fisheries Jurisdiction*" Judgment of 25/07/1974[81], and more recently in the case concerning "*Land and Maritime Boundary* (*Cameroon v. Nigeria*)" Judgment of 10/10/2002.[82]

In the same context it may be added that some bilateral or multilateral agreements under certain circumstances provide for a duty to enter into negotiations (such as, Article VIII/2 of the "Antarctic Treaty" of 01/12/1959[83], Article 15 of the 1979 "Agreement Governing the Activities of States on the Moon and Other Celestial Bodies" (entered into force on 11/07/1984); Article 283 of the UNCLOS of 1982). Furthermore, in the UN "Convention on the Law of the Non-navigational Uses of International Watercourses" of 21/05/1997 the requirement to enter into consultations in a spirit of co-operation is provided in Articles 6/2, 7/2, as well as in Article 8 as a general obligation to co-operate. The latter general obligation is reinforced by a requirement of notification concerning planned measures with possible adverse effects (Article 12) and by a specific requirement that consultations and negotiations should be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State (Article 17/2). Moreover, Article 21/3 explicitly expresses the duty of consultation between the watercourse States with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse.

Peruvian province of Tacna is the River Sama", *ibid* 429. Moreover, the Arbitrator decided that "the Southern boundary of the territory covered by Article 3 of the Treaty of Ancon is the provincial boundary between the Peruvian provinces of Arica and Tarapaca as they stood on 20/10/1883", *ibid* 430; On 03/06/1929 a treaty between Chile and Peru was concluded, giving Tacna to Peru, and Arica to Chile).

79 "*Railway Traffic between Lithuania and Poland* (*Railway Sector Landwarow-Kaisiadorys*)", Advisory Opinion of 15/10/1931 PCIJ Series A/B No.42 1931 108-123, 116 (The PCJI stated that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", but "an obligation to negotiate (did) not imply an obligation to reach an agreement").

80 "*North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark*) (*Federal Republic of Germany v. Netherlands*)" [1969] ICJ Rep 46-47, para 85-86 (The ICJ stated that the obligation to negotiate in good faith should be considered as "a principle which underlies all international relations" and this principle "is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes"), *ibid* 47, para 86 (According to the ICJ, the parties were "under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation". The negotiations are to be "meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it", *ibid* 46-47, para 85/(a). But the ICJ added that the obligation to negotiate does not imply an obligation to reach an agreement, *ibid* 47-48, para 87). Note that in para 87 of the "*North Sea Continental Shelf*" Judgment of 1969, the ICJ also referred to the PCIJ's Advisory Opinion of 15/10/1931, as cited above.

81 "*Fisheries Jurisdiction* (*United Kingdom v. Iceland*)", Judgment of 25/07/1974 (Merits) [1974] ICJ Rep 3, 32, para 75 ("The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes". The Court then referred to *North Sea Continental Shelf* cases Judgment of 1969, para 86); Identical statement in the parallel case, see, *Fisheries Jurisdiction* (*Germany v. Iceland*) [1974] (Merits), ICJ Reports, 175, 201, para 67.

82 "*Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equatorial Guinea Intervening*)", Judgment of 10/10/2002 [2002] ICJ Rep 303, 424, para 244 (The Court stated that "… these negotiations did not lead to an agreement. However, Articles 74 and 83 of the United Nations Law of the Sea Convention do not require that delimitation negotiations should be successful; *like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith*"). (Emphasis added).

83 Article VIII, paragraph 2, of the "Antarctic Treaty" of 01/12/1959 provides that "…the Contracting parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution".

> On the same issue as a soft-law instrument one may refer, for example, to the "*Manila Declaration on the Peaceful Settlement of Disputes between States*", adopted by the UN General Assembly resolution 37/10 on 15/11/1982. Section I, paragraph 10 declares the following: "States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. States should be equally prepared to seek the settlement of their disputes by the other means mentioned in the present Declaration".[84]

c. The ICJ judgments and advisory opinions

Turning to the no (transboundary) environmental harm principle in international jurisprudence[85], as far back as in the 1950s, Judge Alvarez in his Individual Opinion appended to the ICJ's "*Fisheries* (*United Kingdom v. Norway*)" Judgment of 18/12/1951[86] made the following observation: "It is also necessary to pay special attention to another principle which has been much spoken of: the right of States to do everything which is not expressly forbidden by international law. This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day: the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors… which make up what is called the new international law: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society and lastly the prohibition of *abus de droit*".[87] In relation to this observation it may be noted that it is also a well-established principle of international law that in case of a conflict between a treaty and domestic law, the provisions of the latter cannot prevail over those of the treaty, which is explicitly indicated by the PCIJ[88] and the ICJ both

84 "*Peaceful Settlement of Disputes between States*", adopted by the UN General Assembly resolution 37/10 on 15/11/1982, at the 68th plenary meeting. "Manila Declarations" is the Annex of this resolution; Also see, Malcolm Nathan Shaw, *International Law* (Printed in the United Kingdom, 4th printing, 5th edn, Cambridge University Press 2005) 920.

85 Jose Juste-Ruiz, 'The International Court of Justice and International Environmental Law', in N. Boschiero, T. Scovazzi, C. Pitea, C. Ragni (eds) *International Courts and the Development of International Law* (T.M.C. Asser Press, The Hague, The Netherlands, 2013) 383 (The author argues that the contribution of the ICJ to international environmental law is still modest, in spite of its pronouncements affirming the obligation of States to protect the environment, to prevent transboundary harm to other States or areas beyond national jurisdiction, and to carry out an environmental impact assessment before potentially harmful activities are authorized. However, the environmental jurisprudence of the Court appears to be still overly cautious as compared with the more committed attitude adopted by other competing jurisdictions).

86 "*Fisheries* (*United Kingdom v. Norway*)", Judgment of 18/12/1951, [1951] ICJ Rep 116. Taking this case as an example Fitzmaurice examines the relationship between *res judicata* and the precedent. It is clear that the decision of the Court in the *dispositif* is "only binding on the parties to the dispute, and binding on them only for the purposes of the particular dispute". According to Fitzmaurice this is "technically correct, but is it true as a practical reality?" His answer is as follows: "In practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general principle of straight base-lines, at any rate in any legal proceedings, even (in all probability) before a tribunal other than the International Court"; See, Malgosia Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in Symbolae Verzijl, (Présentées au Professeur J. H. W. Verzijl a l'occasion de son XXIème Anniversaire (1958) 153, 170, cited in Robert Yewdall Jennings, '*The Judiciary, International and National, and the Development of International Law*' (1996) 45 (1) ICLQ 1,8.

87 Individual Opinion of Judge Alvarez (n 16) 152.

88 "*Greco-Bulgarian Communities*", Advisory Opinion of 31/07/1930, [1930] 17 PCIJ Series B 4, 32-33, 35. For instance, the "*Greco-Bulgarian Communities*" in answering the question "If the application of the Convention of Neuilly is at variance

in its advisory opinions[89] and judgments.[90]

In relation to Principle 2 of the 1992 Rio Declaration, the ICJ in its Advisory Opinion on the "*Legality of the Threat or Use of Nuclear Weapons*" (1996) clearly stated the following:[91]

> "The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. *The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*", (para.29). (Emphasis added).

At the advisory proceedings on the *"Legality of the Threat or Use of Nuclear Weapons*", some States quoted Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration as the authority which reflects a rule of customary law.[92]

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with a provision of international law in force in the territory of one of the two Signatory Powers, which of the conflicting provisions should be preferred – that of the law or that of the Convention?", clearly states that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty", *ibid* 32. Applying this general principle to the question examined the PCIJ concluded that "if a proper application of the Convention were in conflict with some local law, the latter would not prevail over the Convention", *ibid* 33. In the Operative part of the Opinion with regard to the "III- Answers to the questions drawn up by the Greek Government", the PCIJ in (para 5) again states that "should a proper application of the Convention be in conflict with some local law, the latter would not prevail as against the Convention", *ibid* 35.

89 For instance, see, "*Reparation for Injuries Suffered in the Service of the United Nations*" Advisory Opinion of 11/04/1949, [1949] ICJ Rep 174, 180 (The Court stated that where a "claim is based on the breach of an international obligation on the part of (a) Member (State), the Member (State) cannot contend that this obligation is governed by municipal law"); "*Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1945*", Advisory Opinion of 26/04/1988, [1988] ICJ Rep 12, para 47, para 57 ("...Assistant Attorney General declared that the Act had 'superseded the requirements of the United Nations Headquarters Agreement to the extent that those requirements are inconsistent with the statute...' The Secretary-General, in his reply of 15 March 1988 to the letter from the United States Acting Permanent Representative, disputed the view there expressed, on the basis of the principle that international law prevails over domestic law", *ibid* 31-32, para 47. The Court concluded that "it would be sufficient to recall the fundamental principle of international law that the international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since, for example, in the case concerning the *Greco-Bulgarian 'Communities'*...", *ibid* 34-35, para 57).

90 "*Nottebohm Case* (*Liechtenstein v. Guatemala*)", Judgment of 18/11/1953 (Preliminary Objection), [1953] ICJ Rep 111, 115-117 (In the "*Nottebohm Case*" Guatemala argued, *inter alia*, that "since the jurisdiction of the ICJ in relation to Guatemala has terminated and because it would be contrary to the domestic laws of that country" the Government of Guatemala is unable to appear and to contest the claim which has been made, 115-116. Liechtenstein responded to this argument that "the alleged incapacity (which is not admitted) of the Government of Guatemala under the laws of Guatemala to appear in the present case after 27/01/1952, in no way affects either the obligations of that Government under international law or the jurisdiction of the Court", 117. In the "Declaration of Judge Klaestad" appended to this Judgment, it was stated that "with regard to the allegations of the Government of Guatemala that provisions of its national law prevent that Government and its officials from appearing before the Court, it suffices to say that such national provisions cannot be invoked against the rules of international law", *ibid* 125); Further see, "*LaGrand* (*Germany v. USA*)", Order of 03/03/1999, [1999] ICJ Rep 9, 16, para 28.

91 "*Legality of the Threat or Use of Nuclear Weapons*", Advisory Opinion of 08/07/1996, [1996] ICJ Rep 226, 241-242, para 29.

92 For example, see, '*Government of Solomon Islands Written Observations on the Request by the General Assembly*', in Roger S. Clark and Madeleine Sann (eds) *The Case against the Bomb: Marshall Islands, Samoa & Solomen Islands Before the International Court of Justice in Advisory Proceedings on the Legality of the Threat of Use of Nuclear Weapons* (Rutgers University School of Law at Camden 1996) 73, 160-186.

This dictum was subsequently reconfirmed by the ICJ in its "*Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*" Judgment of 25/09/1997 (para.53), as well as in the provisional measure Order of 13/07/2006 issued in the "*Case concerning Pulp Mills on the River of Uruguay* (*Argentina v. Uruguay*)" (para.72).[93]

The above-mentioned Advisory Opinion (08/07/1996), Judgment (25/09/1997) and provisional measure Order (13/07/2006) of the ICJ should be considered as an extremely important step, also because by virtue of these decisions a soft law principle provided for in Principle 21 of the Stockholm Declaration and in Principle 2 of the Rio Declaration has thus become a jurisprudential standard of an international tribunal.

The same principle also appears in separate or dissenting opinions of the judges of the ICJ. For instance, in his Dissenting Opinion appended to the "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)" Order of 22/09/1995, Judge Koroma stated that "under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances".[94]

Judge Weeramantry in his Dissenting Opinion appended to the ICJ's "*Legality of the Threat or Use of Nuclear Weapons*" Advisory Opinion of 08/07/1996 stated that "principles of environmental law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the *sine qua non* for human survival". The Judge added that "the principle of good neighbourliness... is one of the bases of modern international law, which has seen the demise of the principle that sovereign States could pursue their own interests in splendid isolation from each other. A world order in which every sovereign State depends on the same global environment generates a mutual interdependence which can only be implemented by co-operation and good neighbourliness".[95]

In "*Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*" Judgment of 25/09/1997 the Court also stated that, "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of the damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage", (para.140).

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93 "*Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*", Judgment of 25/09/1997, [1997] ICJ Rep 7, 41, para 53; "*Pulp Mills on the River of Uruguay* (*Argentina v. Uruguay*)", Request for the Indication of Provisional Measures, Order of 13/07/2006, [2006] ICJ Rep 1, 18, para.72.

94 "Dissenting Opinion of Judge Koroma" appended to "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)", Order of 22/09/1995, [1995] ICJ Rep 288, 378.

95 "Dissenting Opinion of Judge Weeramantry" appended to "*Legality of the Threat or Use of Nuclear Weapons*", Advisory Opinion of 08/07/1996, ICJ Rep 503.

v. Status and consequences of the principle in international law

Schachter argues that harm and risk are key concepts in international environmental law. Although no general definition is required, a general conception of environmental harm is implicit in the basic principles of the Stockholm Declaration and in the proposals for international action. With regard to transboundary environmental damage, he suggested at least four conditions which appeared to be necessary: "First, the harm must result from human activity. A second condition is that the harm must result from the physical consequence of the causal human activity. A third condition applicable to international environmental law is that the physical effects cross national boundaries. A fourth condition, rather less precise, is that the harm must be significant or substantial".[96] He further adds that "the duty of a source to inform others of impending harm to them or of significant risk of such harm is an obvious corollary of the general obligation to prevent and minimize transboundary harm. Notification would surely be an appropriate measure when a state has reason to believe that an activity or event in its jurisdiction may cause a significant risk of transboundary harm".[97] International liability is an essential concept in regard to transborder environmental injury.[98] There is no doubt that, in principle, a state that violates a rule of international law by an activity involving transborder injury is liable to make reparation and to compensate the injured state.[99]

One commentator argued that "to assert categorically that the principles have become customary law would require evidence of general state practice and *opinio juris*. Such evidence is only fragmentary. Principle 21 of the Stockholm Declaration is, *at best*, *a starting point*… On the whole, they (environmental treaties) are not accepted as expressions of customary law and are regarded as binding for the parties alone. These facts suggest that the legal principles expressed in the above-mentioned texts are *de lege ferenda* and still await the imprimatur of state practice and *opinio juris communis* to endow them with the authority of customary international law".[100] (Emphasis added). In the same line it is also argued that Principle 21 of the Stockholm Declaration has not reached customary law status.[101]

However, in the view of many scholars "the duty to ensure that activities on one's territory do not cause harm in another state is a customary legal duty, as the rule is

96 Schachter (n 12) 463-464 (This article is also quoted in, Louis Henkin – Richard Crawford Pugh – Oscar Schachter – Hans Smit, *International Law: Cases and Materials* (2nd Reprint-1998, 3rd edn, West Publishing Co. 1993) 1377, 1377).

97 Schachter (n 12) 475.

98 *Ibid* 479.

99 *Ibid* 482.

100 *Ibid* 462.

101 Betsy Baker, 'Legal Protections for the Environment in Times of Armed Conflict' (1993) 33 Va. J. Int'l L. 351, 355-356; Wil D. Verwey, 'Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective' (1995) 8 (1) Leiden JIL 7.

supported by the practice of states"[102]. Furthermore, "Principle 21 of the Stockholm Declaration is widely considered as having become a rule of customary international law."[103] Another scholar mentions that "Principle 21 is generally recognized today as expressing a basic norm of customary international environmental law."[104] Yet another scholar states that Principle 21 "has been commonly regarded as reflecting customary international law, and hence being binding on all states".[105] Some authors argue that the Stockholm Declaration, with a special emphasis on Principle 21, "has a strong claim to be regarded itself as a source of customary international law… The Declaration would certainly impose duties on states, independently of the treaties, not to engage in activities that, for example, would massively and unreasonably deplete the ozone layer".[106]

Numerous scholars are in agreement that Principle 21 of the Stockholm Declaration is customary international law.[107] In the view of Sands "…of these general principles and rules, Principle 21/Principle 2 and the cooperation principle are sufficiently well established to provide the basis for an international cause of action; that is to say, to reflect an international customary legal obligation the violation of which would give rise to a free-standing legal remedy".[108] "The principle of State responsibility for transboundary environmental damage is equally clearly established as a customary international norm, appearing in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, where it is linked with the principle of State sovereignty over natural resources".[109] Sands, even before ICJ's Advisory Opinion of 08/07/1996 on the "*Legality of the Threat or Use of Nuclear Weapons*", argued that Principle 21 (of the Stockholm Declaration) and Principle 2 (of the Rio Declaration)

102 Partan (n 6) 72.

103 Peter H.. Sand, 'UNCED and Development of International Environmental Law' (1993) 8 (2) J. Nat. Resources & Envtl. L. 209, 216; Also see, Pallemaerts (n 24) 5; Philippe Antoine, 'International Humanitarian law and the Protection of the Environment in Time of Armed Conflict' (1992) 32 (291) IRRC 517, 519 (The author stated that the customary nature of this principle (the obligation for States to avoid causing environmental damage beyond their borders) is widely accepted).

104 Alexandre Kiss and Dinah Shelton, *International Environmental Law* (1st Edn, Ardsley-on-Hudson: Transnational Publishers 1991) 106-107; Kiss and Shelton (n 51) 36; Gwenaele Rashbrooke, 'The International Tribunal for the Law of the Sea: A Forum for the Development of Principles of International Environmental Law?' (2004) 19 (4) Int'l J. Marine & Coastal L. 515, 520.

105 Weiss (n 56) 703; Also see, Duncan French, 'Developing States and the Environmental Law' (2000) 49 (1) ICLQ 35, 45 (The author first noted Principle 7 of the Rio Declaration which formulates that "States have common but differentiated responsibilities" and added the following: "Such a notion of commonality is inevitably based on the *customary obligation* that all States are responsible for ensuring 'activities within their jurisdiction and control' do not damage the environment beyond their own territory. As codified in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the Rio Declaration, the text of the 'no harm' obligation makes no reference to the socio-economic situation of States… This *customary obligation* has, more recently, been supplemented by the environmental principles of 'common good', 'common interest' and 'common concern of humankind'…") (Emphasis added).

106 Geoffrey Palmer, 'New Ways to Make International Environmental Law' (1992) 86 (2) AJIL 259, 268

107 Kiss and Shelton (n 104) 130; Timothy J. Heverin, 'Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense' (1997) 72 (4) Notre Dame L. Rev. 1277, 1298; Lluis Paradell-Trius, 'Principles of International Environmental Law' (2000) 9 (2) RECIEL 93, 97.

108 Philippe Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003) 232.

109 Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 (2) J. Envtl. L. 221, 232.

demonstrate that "the responsibility not to cause damage to the environment of other States or of areas beyond national jurisdiction has been accepted as an obligation by all States. Without prejudice to its application on a case by case basis, Principle 21 is widely recognized to reflect customary international law".[110] Following the ICJ's Advisory Opinion of 08/07/1996 the same author observed that that Opinion confirmed that Principle 21 reflects customary international law.[111]

In the view of Cassese, "in the *Trail Smelter* case it was damage caused by one State to the environment of the other that triggered the legal claim. Legally the issue was not viewed as different from damage caused to private or public property, for instance by the inadvertent penetration of a foreign State's territory by armed forces. Nevertheless, there was an important novelty: for the first time an international tribunal propounded the principle that a State may not use, or allow its nationals to use, its own territory in such a manner as to cause injury to a neighbouring country".[112]

According to one commentator, the *Trail Smelter* arbitration case and the ICJ's *Corfu Channel* case "are illustrations of the international responsibility to forbid and refrain a state from acts which would cause injury or damage to persons and property outside its territory".[113] In the *Corfu Channel* case the Court confirmed the general rule "that while the territory remains under the sovereignty of a State it cannot use it or permit it to be used in a way which may cause damage and disaster to other States, and that any such action or negligence will result in international responsibility".[114] Koskenniemi observed that "yet neither case contains criteria for determining the point at which 'harm' might be so significant that it would be unreasonable to expect a country to tolerate it"; but added that "it seems agreed that only harm which is 'significant' is prohibited".[115] Palmer argued that the *Trail Smelter* arbitration also has potential application to ozone and climate change. To the extent that the case establishes a principle of good neighborliness, it may be applied to global environmental problems. "The principle would be that no state has the right to use its territory in such a manner as to cause injury to the atmosphere by emissions when serious consequences are involved and the injury to the atmosphere is demonstrated by clear and convincing evidence. Indeed, the principle established by the case may go further than this and is certainly capable to extension".[116] Werma argued that the

110 Sands (n 24) xxxi.

111 Sands (n 108) 236.

112 Cassese (n 69) 484 (The author added that "later, the idea gradually emerged that natural resources may be relevant not only to the individual States that can exploit them but also to all members of the international community and could be used in the interest of mankind", *ibid*).

113 Edward. G. Lee, 'International Legal Aspects of Pollution of the Atmosphere' (1971) 21 (2) U. Toronto L. J. 203, 207.

114 Lachs (n 46) 665. The author, who also noted the *Trail Smelter* case, added that "the principle established is frequently inadequate to deal with disasters we are facing today. Yet it remains a rock upon which we can build more precise and stringent rules", *ibid*.

115 Koskenniemi (n 13) 77.

116 Palmer (n 106) 265.

Trail Smelter, Corfu Channel and Lac Lanoux cases prove the emergence of the principle of strict liability in international law.[117] According to Barnidge, the *Trail Smelter* arbitration has contributed greatly to international law as it relates not only to the law of state responsibility for transboundary harm to environment, but also to the law of state responsibility for transboundary harm generally. Thus, the *Trail Smelter* rule extends beyond ecological/pollution damage to any damage to other states.[118] Barnidge, reading the *Trail Smelter* rule in relation to the ICJ's dictum stated in (para.29) of the "*Legality of the Threat or Use of Nuclear Weapons*" Advisory Opinion of 08/07/1996, also points out that "that the *Trail Smelter* rule supports a regime of responsibility based other than on fault does not detract from this general rule, nor does it make it any less applicable or relevant when the particular facts and circumstances present a regime of responsibility based on fault".[119]

Elkind is of the opinion that when the decisions in *Trail Smelter* and *Lake Lanoux* are compared with regard to the principle of neighborship, it can be seen that the principle works the same way in international law even though it is unformulated.[120] Birnie and Boyle stated that "if states are responsible for their failure to control soldiers and judges abroad, they may likewise be held responsible for their failure to control transboundary pollution and environmental harm caused by activities within their own territory".[121]

Handl's conclusions regarding state responsibility for extraterritorial environmental effects caused by a state activity were as follows[122]: "(1) Apart from the questions of attribution, causal relationship, and the prerequisite of an additional element of fault, international law requires proof of material damage as a precondition of the polluting state's responsibility to the affected state. (2) The state affected by transnational pollution, therefore, cannot succeed with a claim based on an alleged infliction of a moral injury, a violation of its sovereignty suffered in the fact of a

117 Dhirendra P. Verma, 'The Nuclear Tests Cases: An Inquiry into the Judicial Response of the International Court of Justice' (1982) 8 South African YBIL 20, 44 (The author added that in terms of Article 38 of the ICJ Statute, "a person who keeps a dangerous thing on his premises and allows it to escape shall be liable for the consequences of such escape. The escape and fall-out of radioactive material as a result of atmospheric nuclear tests is certainly covered by the rule of strict liability", *ibid*).

118 Barnidge (n 72) 99; Contra, see, Riccardo Pisillo Mazzeschi, "Forms of International Responsibility for Environmental Harm", in Francesco Francioni & Tullio Scovazzi (eds) *International Responsibility for Environmental Harm*, (Graham & Trotman 1991) 15, 29 who argued that "in spite of the fact that it is so well known, the *Trail Smelter* case is not really very significant, since in the compromise between the US and Canada the question of Canada's responsibility had already been resolved affirmatively", cited in, Barnidge (n 72) 99-100).

119 Barnidge (n 72) 102.

120 Elkind (n 49) 96 (The author's suggestion with regard to formulation of the said principle is as follows: "Where an owner harms his neighbor by an activity carried out solely on his own property and not constitution an invasion of his neighbor's property then the principle of neighborship does not apply". But the author also noted that "where activity causes an invasion of or trespass on one's neighbor's property by smoke, noise pollution, or similar interference in a degree which exceeds that which is reasonably necessary for use or enjoyment of one's own property, then the neighbor has a legal remedy whereby he can either prevent the interference or seek some form of damages", *ibid* 90).

121 Patricia W. Birnie and Alan. E. Boyle, *International Law and the Environment* (2nd edn, Oxford University Press 2002) 265, cited in, Barnidge (n 72) 101.

122 Handl (n 15) 75.

proved transfrontier crossing of pollutants into its territory. The mere fact of such transfrontier crossing does not in itself amount to a violation of sovereignty which could engage the polluting state's liability. (3) Material damage, denoting simply injuries to a state other than those bearing on its status as a sovereign member of the international community[123], including the psychological impact of transnational pollution on the state's population or part thereof, would seem to suffice in itself as a basis for a successful direct international claim against the polluting state."

Kelson asserted three broad principles which, when taken together, help to define the parameters of the rule of State responsibility for abnormally dangerous activities within which States must plan and implement programs of industrial and technological change: "(1) Where the risk of harm from an activity is substantial in either probability or magnitude of harm, and is transnational in character, the State within whose jurisdiction the activity is conducted is under a duty to prevent such harm as may be caused by the enterprise. (2) A State is under a duty to notify any other State which may be threatened by harm from the abnormally dangerous activities which the State permits to be conducted within its jurisdiction. (3) A State, failing to prevent harm, shall be originally responsible and strictly liable for the harm caused by abnormally dangerous activities within its jurisdiction to the residents or property of another State".[124]

Apart from arguments based on legal technicalities, perhaps what Prof. Falk stated in 1970 was the shortest expression in touching upon the essence of the question: "The main point is that separate sovereign states are artificial units from the point of view of environmental protection".[125]

4. Precautionary principle

i. Recognition and scope of the principle in soft law instruments

The UN "World Charter for Nature" of 28/10/1982 which, in addressing "activities which are likely to pose significant risk to nature", declared that "where potential adverse effects are not fully understood the activity should not proceed", (para.11/b). The World Charter for Nature is one of the most elaborate instruments with regard to the precautionary principle. The 1982 Charter, in addition to explicit recognition of the principle, by providing provisions for the protection of unique areas, habitats and

123 *Ibid* 75, note 159 (The author stated that for a notion of injury in this sense, exceeding the narrow economic damage concept adopted by the *Trail Smelter* tribunal).

124 Kelson (n 38) 242-243.

125 Richard A. Falk, 'Toward Equilibrium in the World Order System' (1970) 64 (4) Am. Soc'y Int'l L. Proc. 217, 222; Also see, McCaffrey (n 51) 191 ("Pollution does not respect international boundaries."); Oxhorn (n 42) 389. In relation to the Chernobyl accident, the author stated that that accident "starkly illustrated the fact that nuclear pollution does not respect the boundaries between sovereign states").

species on sustainable use of natural resources[126] or on planning, facilitates potential further development of the principle.[127]

The 1987 Second International Conference on the Protection of the North Sea officially introduced the precautionary principle at the international ministerial level. The *London Declaration*[128] of 25/11/1987, which was issued by the Conference, specifically referred to the principle within the text, such as, "in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence" (Art.VII); "(the participants) accept that by combining, simultaneously and complementary, approaches based on emission standards and environmental quality objectives, a more precautionary approach to dangerous substances will be established" (Art.XV, ii); "(the Ministers) accept the principle of safeguarding the marine ecosystem of the North Sea… (by using) the best available technology and other appropriate measures. This applies especially when there is reason to assume that certain damage or harmful effects on the living resources of the sea are likely to be caused by such substances, even where there is no scientific evidence to prove a causal link between emissions and effects ("the principle of precautionary action")" (article XVI/1).[129] A further step was the Final Declaration of the Third North Sea Conference[130] of 08/03/1990, which was the product of the Third International Conference on the Protection of the North Sea held at The Hague in March 1990. In the preamble of that Final Declaration the participants stated that they "will continue to apply the precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and liable to bioaccumulate even where there is no scientific evidence to prove a causal link between emissions and effects".[131]

126 For example, (para.10/a and b) of the 1982 World Charter for Nature reads as follows: "Living resources shall not be utilized in excess of their natural capacity for regeneration" and "The productivity of soils shall be maintained or enhanced through measures which safeguard their long-term fertility".

127 Lothar Gündling, 'The Status in International Law of the Principle of Precautionary Action' (1990) 5 (1) Int'l J. Estuarine & Coastal L. 23,30.

128 *Second International Conference of the North Sea, London, 24-25 November 1987, Ministerial Declaration*, (London Declaration); 27 ILM 835.

129 See, Gündling (n 127) 25; Mark P.A. Kindall, 'UNCED and the Evolution of Principles of International Environmental Law' (1991) 25 (1) John Marshall L. Rev. 19, 24; James Cameron and Juli Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy For Protection of the Global Environment' (1991) 14 (1) B. C. Int'l & Comp. L. Rev. 1, 4-5; Robin Churchill, 'International Environmental Law and the United Kingdom' (1991) 18 (1) J. L. & Soc'y. 155, 166-167; Phillipe Sands, 'The "Greening" of International Law: Emerging Principles and Rules' (1994) 1 (2) Ind. J. Global Legal Stud. 293, 299; John M. MacDonald, 'Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management' (1995) 26 (3) Ocean Dev. & Int'l L. 255, 267; McIntyre and Mosedale (n 109) 224.

130 *Final Declaration of the Third International Conference on the Protection of the North Sea*, (March 7-8, 1990); reproduced in, (1990) 1 YB Int'l. Envtl. L. 658, 662-673.

131 See, Cameron and Abouchar (n 129) 16; Sands (n 129) 299; McIntyre and Mosedale (n 109) 224.

Although some authors emphasize the non-binding character[132] of such ministerial declarations, this does not mean, however, that "the principle does not exist in international law; it may be recognized as an 'underlying' or 'implied' principle".[133] Political undertakings given by States at such conferences "may in some circumstances become legally binding, either because they are regarded as unilateral declarations intended to be binding or through the doctrine of estoppel."[134] It is also noteworthy that, as shown below, such Ministerial decisions, which at least represent political commitments, were subsequently transferred into legal obligations by the decisions of the international environmental law convention organs, as seen for example, in the decisions of the Oslo and Paris Commissions, established by the 1972 Oslo and the 1974 Paris Conventions, respectively. Furthermore, from the normative point of view, it cannot be ignored that the principle was subsequently inserted into legally binding instruments.

In 1989, the UNEP Governing Council decision 15/27 stated that "waiting for scientific proof regarding the impact of pollutants discharged into the marine environment could result in irreversible damage to the marine environment and in human suffering". It recommended that "all governments adopt the principle of precautionary action" with regard to the prevention and elimination of marine pollution.[135]

As part of the preparations for the 1992 UN Conference on Environment and Development which would be held at Rio by the initiation of Norway in cooperation with the UN Economic Commission for Europe (ECE), a Conference on "Action for a Common Future" convened at Bergen, Norway, in May 8-16, 1990. Environment Ministers and officials from 34 ECE States attended the Conference. The product of this meeting was the "*Bergen Ministerial Declaration on Sustainable Development*".[136] Article 7 of the Bergen Declaration provides that "in order to achieve sustainable development, policies must be based on the *precautionary principle*. Environmental measures must anticipate, prevent, and attack the causes of environmental

132 Peter Hayward, 'The Oslo and Paris Commissions' (1990) 5 (1) Int'l J. Estuarine & Coastal L. 91, 93 ("The INSCs are not held within the framework of any internationally ratified convention or treaty. They are meetings of Ministers with common responsibilities, similar problems and shared goals. Their statements represent a political commitment rather than a legal obligation. This is not in any way to belittle the impact or importance of the Conferences but is important to be clear about the nature of their 'decisions'…").

133 Gündling (n 127) 27 (The author further argued that "the principle of precautionary action played a considerable role in the debate on the appropriate protection policy for the North Sea. However, it has not always been clear whether the issue was the (precautionary) principle itself or, rather, a specific regulatory approach usually linked to the principle of precautionary action, namely that of control of emissions at source using the best available technology", *ibid* 23).

134 Churchill (n 129) 157 (The author added that "decisions of international conferences of this character are often known as 'soft law'…", *ibid* 166).

135 UNEP Governing Council Decision 15/27 (1989) on the "*Precautionary Approach to Marine Pollution*"; see, UNEP, *1989 Report of the Governing Council on the Work of its Fifteenth Session*, United Nations Environment Programme, UN GAOR, 44th Sess. Supp No 25, 12th meeting, UN DOC A44/25 (1989) 153; Also see, McIntyre and Mosedale (n109) 226.

136 "*Bergen Ministerial Declaration on Sustainable Development in the ECE Region*" of 16/05/1990; *reproduced in*, UN Doc. A/CONF.151/PC/10 (1990); 30 ILM 800 (1991); (1990) 1 YB Int'l. Envtl. L. Vol.1 429, 431-432.

degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation". (Emphasis added). The importance of this ministerial level declaration emanates from the fact that the signatories to the Declaration agree that the precautionary principle exists.[137]

Principle 15 of the 1992 Rio Declaration reads:

> "In order to protect the environment, *the precautionary approach* shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". (Emphasis added).

At the drafting process of the 1992 Rio Declaration the negotiators rejected suggestions by some European countries to promote a "Precautionary Principle".[138] As shown above, Article 7 of the 1990 Bergen Ministerial Declaration indeed used the term "precautionary principle". Although there are arguments which clarify the distinction between the terms "approach" and "principle"[139], the latter term, i.e. the "precautionary principle" with regard to environmental issues, now appears to be widely used.

Furthermore, with respect to the first sentence of the provisions concerned in both the Bergen and Rio Declarations, it may be noted that the phrase "according to their capabilities" as placed into the Rio Declaration norm did not appear in the Bergen Declaration. The inclusion of the said phrase ("according to their capabilities") shows that, in applying the principle, States would like to preserve a significant margin of appreciation or flexibility. One of the other differences is that the second sentence of Article 7 of the Bergen Declaration is entirely omitted in the Rio Declaration. Finally, the second sentence of Principle 15 of the Rio Declaration, which corresponds with the third sentence of Article 7 of the Bergen Declaration, includes the term "cost-effective", which did not appear in the 1990 text.

One author observed that the precautionary approach is defined in the text by language quoted from the November 8, 1990, Ministerial Declaration of the Second

137 Cameron and Abouchar (n 129) 18 (The authors added that "by linking the principle to development proposals, the signatories have given substance to the occasionally vague policy of sustainable development. In applying a precautionary approach to development decisions, the burden of proof shifts to proponent of development to show that an emission or construction will not seriously damage the environment", *ibid*); Also see, Sands (n 129) 299; MacDonald (n 129) 264.

138 Deanna Kovar, 'A Short Guide to the Rio Declaration' (1993) 4 (1) Colo. J. Int'l Envtl. L. & Pol'y 118, 134.

139 Ellen Hey, 'The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution' (1992) 4 (2) Geo. Int'l Envtl. L. Rev. 303, 304 (The author suggests that a distinction be made between the terms "principle" and "approach"; for an analysis of the "precautionary concept", see, *ibid* 305-309); Also see, Ellen Hey, 'The Precautionary Approach: Implications of the revision of the Oslo and Paris Conventions' (1991) 15 (4) Marine Policy 244; MacDonald (n 129) 256; Stephanie Joan Mead, "The Precautionary Principle: A Discussion of the Principle's Meaning and Status in an Attempt to Further Define and Understand the Principle" (2004) 8 N.Z. J. Envtl. L. 137, 158-160.

World Climate Conference.[140] In circumstances where there is a threat of serious or irreversible environmental damage, States are not to postpone otherwise cost-effective measures to prevent environmental degradation solely because of a lack of full scientific certainty.[141]

Pursuant to paragraph 22.5(c) of the Agenda 21, States should not "promote or allow the storage or disposal of high-level, intermediate-level or low-level radioactive waste near the marine environment unless they determine that the scientific evidence, consistent with the applicable internationally agreed principles and guidelines, shows that such storage or disposal poses no unacceptable risk to people and the marine environment or does not interfere with other legitimate uses of the sea, making, in the process of consideration, appropriate use of the concept of *the precautionary approach*".[142] (Emphasis added).

In 1995, the 4th North Sea Conference of Ministers directly addressed the issue of hazardous chemicals in the environment: "The Ministers agree that the objective is to ensure a sustainable, sound and healthy North Sea ecosystem. *The guiding principle for achieving this objective is the precautionary principle*. This implies the prevention of the pollution of the North Sea by continuously reducing discharges, emissions and losses of hazardous substances thereby moving towards the target of their cessation within one generation (25 years) with the ultimate aim of concentrations in the environment near background values for naturally occurring substances and close to zero concentrations for man-made synthetic substances." (Emphasis added).

In order to pursue the evolution of the notion one may also refer to the "*Wingspread Consensus Statement on the Precautionary Principle*"[143] of 26/01/1998, a product of the experts meeting in the field. It states:

> "…We believe there is compelling evidence that damage to humans and the worldwide environment is of such magnitude and seriousness that new principles for conducting human activities are necessary.
>
> While we realize that human activities may involve hazards, people must proceed more carefully than has been the case in recent history. Corporations, government entities, organizations, communities, scientists and other individuals must adopt a precautionary approach to all human endeavors.
>
> Therefore, it is necessary to implement the Precautionary Principle: *When an activity raises threats of harm to human health or the environment, precautionary measures*

140 UN GAOR, 45th Sess., Agenda Item 81, at 17, UN Doc. A/45/696/Add.1 1990.

141 Kovar (n 138) 134.

142 Furthermore, paragraph 22.5(b) of Agenda 21 called on all States to encourage "the London Dumping Convention to expedite work to complete studies on replacing the current voluntary moratorium on disposal of low-level radioactive wastes at sea by a ban, taking into account the precautionary approach…".

143 "*The Wingspread Consensus Statement on the Precautionary Principle*", adopted by the Wingspread Conference on the Precautionary Principle on 26/01/1998, available at, <http://www.sehn.org/wing.html>.

> *should be taken even if some cause and effect relationships are not fully established scientifically*.
>
> In this context the *proponent of an activity*, rather than the public, *should bear the burden of proof*.[144]
>
> The process of applying the Precautionary Principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action". (Emphasis added).

Consequently, the Wingspread Statement on the Precautionary Principle indicates four basic elements of precautionary policies: taking preventive action in the face of uncertainty; placing responsibility on those who create risks to study and prevent them; seeking alternatives to potentially harmful activities; and increasing public participation and transparency in decision-making.

In the literature, however, the Wingspread Statement on the Precautionary Principle formulation and the definition of the precautionary principle have also been criticized due to lack of clarity.[145]

The formulation in Principle 15 of the 1992 Rio Declaration has some important characteristics. First, the principle applies only to "threats of serious or irreversible damage". Secondly, it applies only to actions that would result in "environmental degradation". Thirdly, the principle indicates that any regulatory actions undertaken should be "cost-effective". Fourthly, the principle is not formulated in such a way as to impose affirmative duty to act.[146]

Since the precautionary principle[147] aims to prevent the occurrence of environmental

144 With regard to the quoted and emphasized two paragraphs Sunstein commented that "the first sentence just quoted is a mildly more aggressive version of the statement from the Rio Declaration; it is more aggressive because it is not limited to threats of serious or irreversible damage. But in reversing the burden of proof, the second sentence goes further still"; See, Cass R. Sunstein, 'Beyond the Precautionary Principle' (2003) 151 (2) U. Pa. L. Rev. 1003, 1013.

145 Derek Turner and Lauren Hartzell, 'The Lack of Clarity in the Precautionary Principle' (2004) 13 (4) Environmental Values 449 (The authors invoke the Wingspread Statement to assess definitional generalities. According to them, the statement "fails to indicate who must bear the cost of precaution; what constitutes a threat of harm; how much precaution is too much; and what should be done when environmental concerns and concern for human health pull in different directions", *ibid* 459); (Especially see, "Problems with the Wingspread Principle" *ibid* 453-458).

146 Gary E. Marchant, 'From General Policy to Legal Rule: Aspirations and Limitations of the Precautionary Principle' (2003) 111 (14) Environ Health Perspect**.** 1799, 1800 (The author compared Principle 15 formulation of the Rio Declaration with the formulation provided in the Wingspread Statement of 1998; Also see, John S. Applegate, 'The Taming of the Precautionary Principle' (2002) 27 (1) Wm. & Mary Envtl. L. & Pol'y Rev. 13. According to the author "in the Rio formulation, the trigger is represented by the phrase '*threats* of *serious or irreversible* damage.' In terms of timing, '*lack of full scientific certainty* shall not be used as a reason for *postponing*…. measures to *prevent*.' The expected response is '*cost-effective* measures to *prevent* environmental degradation.' Iteration is implied in the idea of '*full* scientific certainty,' because there will never be full scientific certainty, but certainty can be progressively approached. The Rio formulation is silent on burden of proof", *ibid* 20). (Emphasis original).

147 David Freestone and Ellen Hey, 'Origins and Development of the Precautionary Principle', in David Freestone & Ellen Hey (eds) *The Precautionary Principle and International Law: The Challenge of Implementation* (Kluwer Publishers 1996) 3-15; James Cameron and Juli Abouchar, 'The Status of the Precautionary Principle in International Law', David Freestone & Ellen Hey (eds) *The Precautionary Principle and International Law: The Challenge of Implementation* (Kluwer Publishers 1996) 29-52; Donald T. Hornstein, 'Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis' (1992) 92 (3) Columbia L. J**.** 562; Daniel Bodansky, 'Scientific Uncertainty and the Precautionary Principle' (1991) 33 (7) Environment: Science and Policy for Sustainable Development 4; Barnabas Dickson, 'The Precautionary

harm, it is related to the concept of risk. As Schachter stated "risk is probabilistic concept that takes account of the uncertainties of future events as well as the variations in severity of effects. A duty to prevent and minimize risk is legally distinct from a duty to act to contain and minimize harmful effects that have already occurred. In the former, the objective requires identifying situations in terms of degree of danger and adopting rules of conduct to reduce that danger".[148] Weiss argued that "scientific uncertainty is inherent in all international environmental law. We do not have a full understanding of the natural system or of our interactions with it. Our scientific understanding is always changing, as is our technological knowledge and know-how. Consequently, those who draft international agreements have had to design instruments and implementation mechanisms that have sufficient flexibility in order to allow parties to adapt the changes in our scientific understanding and technological abilities".[149] "At its core, the precautionary principle embodies two fundamental regulatory policies: anthropogenic harm to human health and the environment should be avoided or minimized through anticipatory, preventive regulatory controls; and, to accomplish this, activities and technologies whose environmental consequences are uncertain but potentially serious should be restricted until the uncertainty is largely resolved".[150]

It is true, some authors argue that although the precautionary principle/approach is "apparently reasonable, this phrase seems to be somewhat ambiguous; in particular, the definition of 'serious' is clearly subjective and contextual"[151]; it still has no set of definition and there are set limits or rules as to its application.[152] It is also argued that

Principle in CITES: A Critical Assessment' (1999) 39 (2) Natural Resources Journal 211; Per Sandin, 'Dimensions of the Precautionary Principle' (1999) 5 (5) Human and Ecological Risk Assessment: An International Journal 899; Per Sandin, 'The Precautionary Principle and the Concept of Precaution' (2004) 13 (4) Environmental Values 461; Bodansky, 'Deconstructing the Precautionary Principle' in D. D. Caron and H. N. Scheiber (ed) *Bringing New Law to Ocean Waters*, (Brill 2004) 381 (The author concludes that it is necessary to think about what it means to be cautious in particular contexts, rather than continued incantations of the same old formulations); Lauren Hartzell-Nichols, '*Adaptation as Precaution*' (2014) 23 (2 Special Issue) Environmental Values 19. (Adaptation may therefore be understood as a precautionary measure against the damage due to climate change. The precautionary principle alone is too vague to shape adaptation policy, but a limited catastrophic precautionary principle may productively guide adaptation policy makers. The author argues that an explicit commitment to a precautionary approach based on the catastrophic precautionary principle could and should be made to strengthen the adaptation policies introduced at the United Nations Framework Convention on Climate Change); Further see, Christopher D. Stone, '*Is There a Precautionary Principle*' (2001) 31 (7) ELR News & Analysis 10790; Stephen M. Gardiner, "*A Core Precautionary Principle*" (2006) 14 (1) Journal of Political Philosophy 33; Marko Ahteensuu, 'Defending the Precautionary Principle Against Three Criticisms' (2007) 11 (61/56) Trames 366 (Arguments with regard to the vagueness of the PP, *ibid* 368-371, However, the author concludes that various arguments raised against precautionary principle do not result in the abandonment of the principle on the whole, *ibid* 378-379); Jonathan Aldred, 'Justifying precautionary policies: Incommensurability and uncertainty' (2013) 96 Ecological Economics 132 (According to the author the precautionary principle is justified for decisions involving uncertainty and incommensurability. The 'greater' the uncertainty, the 'less' incommensurability is required to justify precautionary action, and vice versa.); Thomas Boyer-Kassem, 'Is the Precautionary Principle Really Incoherent?' (2017) 37 (11) Risk Analysis 2026 (The author concludes that the PP can be envisaged as a coherent decision rule).

148 Schachter (n 12) 466.

149 Weiss (n 56) 688.

150 Applegate (n 146) 13.

151 Shawkat Alam, 'The United Nations' Approach to Trade, the Environment and Sustainable Development' (2006) 12 ILSA J. Int'l & Comp. L 607, 635.

152 Mead (n 139) 138; also see, *ibid* 142-147 and other sources cited there with respect to uncertainty of the definition of the

the precautionary principle is too vague to serve as a regulatory standard.[153] Similarly, some commentators state that "practical interpretation of this 'approach' is creating difficulties in pollution control and fisheries commissions since it is not clear when and where the lines are to be drawn and some go so far as to presume that the burden of proof that there is no threat of damage lies with the state undertaking the activity, not those opposing it, who would have to establish that the activity is likely to or may cause harm".[154] Even going further, in the view of another commentator the precautionary principle should be rejected, not because it leads in bad directions, but because it leads in no direction at all. The principle threatens to be paralyzing, forbidding regulation, inaction, and every step in between.[155]

However, there seems to be a general agreement that the precautionary concept "may require preventive action before scientific proof of harm has been submitted. It rejects a policy whereby activities or substances are regulated or banned only if they have been scientifically proven to be harmful to the environment".[156] "Even though (in its current form) some wording is open to interpretation, there is a basic premise that stands out. This was clearly outlined in the Rio Declaration and most recently, the Earth Charter. The status of the precautionary principle has also increased as it is increasingly recognised and applied in international law".[157] According to one commentator, the precautionary principle "requires that where a causal link cannot be shown between the activity or substance introduced and a potential harm, extreme caution must be taken before allowing such an activity. This reading of the principle relies on an examination of causal links between activities and potential harms and threats".[158] In the view of another commentator the precautionary principle, or precautionary approach, in international environmental law is one response to the recognition that we are faced with the necessity to act in the face of scientific uncertainty about future harm. The principle lowers the burden of proof required for taking action against proposed or existing activities that may have serious long-term

principle, including the formulation provided in Principle 15 of the Rio Declaration; Further see, Dickson (n 147) 212 (According to the author, due to the lack of a fixed definition there is still considerable doubt about the policy implications of the principle); Sandin (n 147) 461 (The debate around the principle indicates that there is little agreement on what 'taking precautions' means).

153 Bodansky (n 147) 4-5; MacDonald (n 129) 257.

154 Birnie (n 5) 95.

155 Sunstein (n 144) 1004, 1054 8 (Although the author accepts that the precautionary principle "might well be seen as a plea for a kind of regulatory insurance" and it "might do some real-world good, spurring governments to attend to neglected problems", nevertheless "the principle cannot be fully defended in these ways, simply because risks are on all sides of social situations. Any effort to be universally precautionary will be paralyzing, forbidding every imaginable step, including no step at all", *ibid* 1007-1008. The author further suggested that "the weak versions of the precautionary principle are unobjectionable and important" *ibid* 1016, also see, *ibid* 1029).

156 Hey (n 139) 305; Günther Handl, 'Environmental Security and Global Change: The Challenge to International Law' (1990) 1 Y.B. Int'l Envtl. L 3, 20-22.

157 Mead (n 139) 176.

158 MacDonald (n 129) 256 (But the author also noted that "implementing the precautionary principle into practice on international issues is difficult where there is no consensus on its theoretical implications. The principle is not yet recognized as accepted customary law, primarily because of the polarized arguments that have arisen in attempting to define the doctrine", *ibid* 263).

harmful consequences.[159]

In the early 1990s it was argued that any precautionary approach should include the following elements: (1) scientific debate and uncertainty are the rule rather than the exception; (2) steps should be taken to analyze the environmental impacts of proposed actions and notify potentially affected parties; (3) efforts should be taken to prevent or minimize pollution and reduce risks of environmental harm through clean technologies and good management practices; (4) to the extent that the risks of environmental harm from proposed activities cannot be eliminated or reduced: (a) the activities should not be permitted where there is significant risk of serious or irreversible damage to the environment, (b) where there is no such risk, the benefits from such activities should be weighed against the potential environmental damage; (c) where activities are permitted, appropriate steps should be taken to mitigate anticipated environmental harm.[160] More recently it is also argued that substantive elements of a precautionary approach are as follows: "*Preventive action*", as indicated in the 1982 World Charter for Nature (para.11), and the 1990 Bergen Declaration[161] (para.7); "*Shifting the burden of proof*", rather than creating an absolute duty of prevention whenever an activity creates a risk of environmental harm; "*Best available technology or clean production methods*", and finally "*Cost-effectiveness*".[162]

In order to clarify the principle four basic elements can be identified: (1) a "threat of harm": although in meeting this element no scientific proof is required of the certainty of the harm, it nevertheless does not allow mere speculative, groundless concerns or claims based on vague notions or arguments entirely lacking in scientific support. (2) The principle applies in situations where there is "lack of scientific certainty or evidence". (3) The application of this principle in a situation where "cause and effect relationship" has not yet been proven. (4) There is a "necessity or duty to act": this element indicates that the principle is invoked by interested parties to protect the environment without the need for a proven link between cause and effect.[163] Another author made a similar assessment, stating that the first element is

159 Weiss (n 56) 690 (The author added that "at the fall 1991 meeting of the parties to the London Ocean Dumping Convention, countries agreed to be guided by a 'precautionary approach' in implementing the Convention. They would take preventive action when there is reason to believe the dumped material is likely to cause harm even when there is no conclusive evidence to prove a causal link to certain effects, and they would be guided by certain specific measures in carrying out this approach", *ibid*, p.690, note 111). We may add that, as shown below, the Protocol of 07/11/1996 to the London Dumping Convention" of 29/12/1979 clearly included the "precautionary approach" in Article 3. Thus, it is understood that the 1991 decision of the parties to the London Ocean Dumping Convention was subsequently integrated into a legally binding instrument.

160 Kindall (n 129) 25-26.

161 The "*Bergen Ministerial Declaration on Sustainable Development in the ECE Region*" of 16/05/1990; *reproduced in*, UN Doc. A/CONF.151/PC/10 (1990); 30 ILM 800 (1991); (1990) 1 YB Int'l. Envtl. L. 429, 431-432.

162 Bodansky (n 147) 390-391.

163 Peter L. DeFur and Michelle Kaszuba, 'Implementing the Precautionary' (2002) 288 (1-2) The Science of the Total Environment 155, 158, cited in, Mead (n 139) 150; Cf, Sandin (n 147) 889-907 (According to the author four dimensions of the principle are identified: (i) the threat dimension, (ii) the uncertainty dimension, (iii) the action dimension, and (iv) the command dimension. It is argued that the Precautionary Principle can be recast into the following if-clause, containing these four dimensions: "*If* there is (1) a threat, which is (2) uncertain, *then* (3) some kind of action (4) is mandatory").

the level of the risk that justifies precautionary action. The second element is what action should be taken when a situation triggers this level of risk and uncertainty. The third is whether it allows a balancing of the risks and benefits of a certain action or situation before invoking precautionary means. And the fourth is the level of scientific certainty, i.e., whether a consensus, but lack of certainty, can be used to avoid precautionary action.[164]

The basic premise of the principle is as follows: "The precautionary principle ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage". It is a "guiding principle. Its purpose is to encourage –perhaps even oblige– decision makers to consider the likely harmful effects of their activities on the environment before they pursue those activities".[165] Some authors emphasized that the "uncertainties are forcing the international community to make difficult decisions regarding responses needed to counter the looming threat of global warming. The choice appears to be between adopting a precautionary approach today, one that will be very expensive and that may itself alter society in fundamental ways, or waiting for the results of the current 'experiment', and suffer the cataclysm that could result from making the wrong guess – a planet warming so rapidly that life may not be able to adapt. The choice seems clear: international society does not have the luxury of waiting for scientific certainty before it responds to the potential threat of global warming".[166] According to Blackwelder, "the precautionary principle mandates that when there is a risk of significant health and environmental damage to others or to future generations, and when there is scientific uncertainty as to the nature of that damage or the likelihood of the risk, then decisions should be made so as to prevent such activities from being conducted unless and until scientific evidence shows that the damage will not occur".[167]

Making reparation to the injured State or States for breaches of international obligation under traditional international law did not effectively deal with the question of prevention of harmful consequences of activities that may have adverse effects on the environment. This fact necessitates and legitimizes the development of the precautionary principle. Falk observed that "we do not know exactly where to locate thresholds of irreversibility, but we do know that environmental quality is

164 Deborah Katz, 'The Mismatch Between the Biosafety Protocol and the Precautionary Principle' (2001) 13 (4) Geo. Int'l Envtl. L. Rev 949, 956; for the examination of those four elements in the context of various conventions recognizing the principle, see, *ibid* 961-965.

165 Cameron and Abouchar (n 129) 2; Also see, Cameron and Abouchar (n 147) 44-45; Further see, MacDonald (n 129) 256.

166 Durwood Zaelke and James Cameron, 'Global Warming and Climate Change- An Overview of the International Legal Process' (1990) 5 (2) Am. U. J. Int'l L. & Pol. 249, 251.

167 *Capitol Hill Hearing Testimony Concerning the Cloning of Humans and Genetic Modifications before the Subcomm. on Labor, Health and Human Servs., S. Appropriations Comm.*, 107th Cong. (2002), (statement of Dr. Brent Blackwelder, President, Friens of the Earth, LEXIS CNGTST File, cited in, Sunstein (n 144) 1013.

deteriorating and that a growing number of experts are viewing the near future with alarm".[168] As one commentator observed "once a species is wiped out, 'restitution' in the sense of restoration of the *status quo ante*, is impossible. Deforestation, especially in tropics, is extremely difficult to reverse. And given that, by definition, all elements of the biosphere are interconnected, cooperation on the international level is imperative if the health of the globe is to be restored".[169] Similarly, it was also argued that "if the harm caused by abnormally dangerous activities on the international level is irreparable or irreversible, liability for damage after the fact of injury may prove of little consequence. The shifting of cost from the victim to the State which sponsors an enterprise is, after all, only part of the desired international regime. Basically, the world community wishes to avoid injury and damage altogether".[170]

The precautionary principle/approach is based upon new set of assumptions, such as, the vulnerability of the environment; the limitations of science to accurately predict threats to the environment, and the availability of alternative, less harmful processes and products.[171]

The "precautionary principle" or "precautionary approach" can also be found in some of the binding legal instruments on environmental protection.

ii. The principle with respect to atmospheric pollution

Preamble paragraph 5 of the Vienna "Convention for the Protection of the Ozone Layer"[172] of 22/03/1985 stresses the precautionary measures for the protection of the ozone layer which have already been taken at national and international levels.[173]

168 Falk (n 125) 217.

169 Stephen McCaffrey, 'The Law of International Watercourses: Ecocide or Ecomanagement?' (1990) 59 (4) Rev. Jur. U.P.R. 1003, 1004.

170 Kelson (n 38) 242.

171 Hey (n 139) 308; McIntyre and Mosedale (n 109) 222.

172 The "*Convention for the Protection of the Ozone Layer*", adopted on 22/03/1985 and entered into force on 22/09/1988; *reproduced in*, 26 ILM 1516 (1987).

173 "Early versions of the precautionary principle were silent on the question whether, by taking action on the basis of present uncertainty, regulatory authorities are obliged to revisit their decisions as new information becomes available. The 1985 Vienna Convention for the Protection of the Ozone Layer is a notable, and interesting, exception. A framework treaty that was structured to be progressively implemented by subsequent protocols, it very much looks to future regulatory action. Its preamble states that parties are, "determined to protect the ozone layer by taking precautionary measures... with the ultimate objective of their [i.e., ozone depleting substances] elimination *on the basis of developments in scientific knowledge,* taking into account technical and economic considerations." The Convention clearly anticipates that increasing knowledge and technology will indicate further reductions (rather than increases) in ozone-depleting substances, as has in fact happened; See, Applegate (n 146) 31. Although the author specifically indicates the 1985 Convention it is apparent that the quoted expression is taken from the Preamble of the 1987 Montreal Protocol.

The "Montreal Protocol on Substances that Deplete the Ozone Layer"[174] of 16/09/1987 establishes specific obligations in the implementation of the Vienna "Convention for the Protection of the Ozone Layer" of 22/03/1985. The obligations imposed upon Parties by the Montreal Protocol included reducing emissions of ozone-depleting substances (Articles 2, 3 and Annexes), controlling international trade in ozone-depleting substances (Article 4), and national and regional reporting requirements (Articles 7 and 9). In addition the Protocol also provided for environmental dispute avoidance and settlement, a noncompliance procedure regime (Article 8). Article 8 of the Montreal Protocol reads as follows: "The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining noncompliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance". According to Article 9, paragraph 2, of the Montreal Protocol the Parties undertake to co-operate in promoting public awareness of the environmental effects of the emissions of controlled substances and other substances that deplete the ozone layer.[175]

The 1987 Montreal Protocol in its preamble states that the Parties, though "aware that measures taken to protect the ozone layer from depletion should be based on relevant scientific knowledge" (para.5), are "determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it" (para.6). The preamble further notes "the precautionary measures… that have already been taken at national and regional levels" (para.8).

Furthermore, the precautionary principle is also emphasized by the Meeting of the Parties to the Montreal Protocol. For example, in the 1995 Meeting many governmental representatives stated that "the precautionary principle, which had been a cornerstone of the ozone regime from the outset, should continue to be applied as Parties addressed ongoing threats to the ozone layer".[176] The 2008 "*Doha*

174 The "*Montreal Protocol on Substances that Deplete the Ozone Layer*", adopted on 16/09/1987 and entered into force on 01/01/1989; *reproduced in*, 26 ILM 1541 (1987). Since 196 Parties have ratified the "Montreal Protocol on Substances that Deplete the Ozone Layer" of 16/09/1987, it represents universal ratification, and also a higher number of Parties than any other treaties in history. The London Amendment to the Montreal Protocol = 195 Parties; the Copenhagen Amendment = 192 Parties; the Montreal Amendment = 181 Parties and the Beijing Amendment = 165 Parties; data is available at, <http://www.unep.ch/ozone/Ratification_status/index.shtml>

175 See, Osamu Yoshida, 'Soft Enforcement of Treaties: The Montreal Protocol 's Noncompliance Procedure and the Functions of Internal International Institutions' (1999) 10 Colo. J. Int'l Envtl. L. & Pol'y 95, 98 (According to Yoshida "under the present international cooperation regime for protecting the ozone layer, the only legal remedy is collective treaty compliance. Monetary compensation by sovereign states consuming ozone-depleting substances (ODSs) or by transnational corporations producing ODSs is not available. Under the Montreal noncompliance procedure (NCP) regime, either a member state on the United Nations Environment Programme (UNEP) Ozone Secretariat can initiate procedural mechanisms to ensure implementation of the international ozone treaties without any question of its own legal interests being involved. Therefore, international NCP regime initiators do not have to exhaust any domestic legal remedies as a precondition. In this respect, the Montreal NCP is an unprecedented procedural mechanism designed to effectively enforce international obligations *erga omnes*, in this case the global protection of the stratospheric ozone layer". The author added that "compared with traditional judicial settlements that usually require time-consuming processes, the NCP regime seems to be more flexible, simple and rapid", *ibid* 99).

176 *Report of the Seventh Meeting of the Parties to the Montreal Protocol*, Vienna 5-7 December 1995, UNEP/OzL.Pro.7/12, 27 December 1995, para.60; available at, <http://www.unep.ch/ozone/Meeting_Documents/mop/07mop/MOP_7.shtml>

Declaration" which was adopted by the ministers of the environment and heads of delegation of the 143 Parties attending the eighth meeting of the Conference of the Parties to the Vienna Convention for the Protection of the Ozone Layer and the Twentieth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, in preambular paragraph (d) stated, *inter alia*, the following: "*Cognizant of the fact* that safeguarding the ozone layer will require continued global commitment, a sustained level of scientific research and monitoring and the taking of precautionary measures to control equitably total global emissions of substances that deplete the ozone layer".[177]

Similarly, the UN "Framework Convention on Climate Change" of 09/05/1992 explicitly refers to the precautionary principle, but different than aforementioned two instruments, not in its preamble but in Article 3, paragraph 3. It reads: "The Parties should *take precautionary measures* to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. *Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures*, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties."[178] (Emphasis added).

The Parties of the "Protocol on Further Reduction of Sulphur Emissions"[179] of 14/06/1994 declared that they were "*resolved* to take precautionary measures to anticipate, prevent or minimize emissions of air pollutants and mitigate their adverse effects", and "*convinced* that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that such precautionary measures to deal with emissions of air pollutants should be cost-effective", (preamble paragraphs 3 and 4). For the same line of provisions one may refer to other subsequent Protocols to the 1979 Convention on Long-Range Transboundary Air Pollution. For example, in preamble paragraph 3 of the "Protocol on Persistent Organic Pollutants" of 24/06/1998, the Parties stated that they were "*resolved* to take measures to anticipate,

177 *Report of the eighth meeting of the Conference of the Parties to the Vienna Convention for the Protection of the Ozone Layer and the Twentieth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Doha, 16–20 November 2008, UNEP/OzL.Conv.8/7-UNEP/OzL.Pro.20/9, 27 November 2008, "Annex VI – Doha Declaration". Available at, <http://www.unep.ch/ozone/Meeting_Documents/mop/20mop/MOP-20-9E.pdf>

178 See, *ibid*, note given for Principle 15 of the Rio Declaration.

179 The "*Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions*" adopted on 14/06/1994 and entered into force on 05/08/1998; available at, <http://www.unece.org/env/lrtap/pops>

prevent or minimize emissions of persistent organic pollutants, taking into account the application of the precautionary approach, as set forth in principle 15 of the Rio Declaration on Environment and Development". Similar expression appears in preamble paragraph 8 of the "Protocol on Heavy Metals" of 24/06/1998 with respect to "emissions of certain heavy metals and their related compounds", and in preamble paragraph 11 of the "Protocol to Abate Acidification, Eutrophication and Ground-Level Ozone" of 30/11/1999 with the phrase of "emissions of these substances".[180]

iii. The principle with respect to nature, including marine, conservation

For instance, among others, preambular paragraph 4 and Articles 61, 63-66, 116-119, as well as the provisional measure provision of Article 290, of the UN "Convention on the Law of the Sea" of 1982 may be noted in relation to "precautionary approach". Judge Laing in his Separate Opinion appended to "*Southern Bluefin Tuna Cases*" (*Cases Nos.3 and 4)*, ITLOS Order of 27/08/1999, summarized the relevant provisions of the UNCLOS as follows:[181]

> "It cannot be denied that UNCLOS adopts a precautionary *approach.* This may be gleaned, *inter alia,* from preambular paragraph 4, identifying as an aspect of the "legal order for the seas and oceans" "the conservation of their living resources ..." Several provisions in Part V of the Convention, e.g. articles 63-66, on conservation and utilization of a number of species in the exclusive economic zone, identify conservation as a crucial value. So do article 61, specifically dealing with conservation in general, and article 64, dealing with conservation and optimum utilization of highly migratory species (such as tuna). Article 116, on the right to fish on the high seas, *inter alia* reiterates the conservation obligation on nationals of non-coastal/distant fishing States while fishing in the exclusive economic zone of other States. Article 117 explicitly articulates the duty of all States "to take, or to cooperate with other States in taking such measures for their respective nationals as may be necessary for" conservation of living resources in the high seas. Article 118 requires inter-State cooperation in the conservation and management of high seas living resources. Such cooperation is to extend to negotiations leading to the establishment of subregional or regional fisheries organizations. And article 119, entitled "conservation of the living resources of the high seas", deals with the allocation of allowable catches and "establishing other conservation measures". Although paragraph 1(a) refers to measures, based on the best scientific evidence, for production of the maximum sustainable yield, the conservatory thrust of this article is vigorously reaffirmed by the treatment, in paragraph (b), of the effects of management measures on associated or dependent species the populations of which should be maintained or restored "above levels at which their reproduction

180 The "Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants" adopted on 24/06/1998 and entered into force on 23/10/2003; "Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals" adopted on 24/06/1998 and entered into force on 29/12/2003; and "Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone", adopted on 30/11/1999 and entered into force on 17/05/2005; all available at, <http://www.unece.org/env/lrtap/pops>

181 "Separate Opinion of Judge Laing", para 17 appended to "*Southern Bluefin Tuna Cases*" (Cases Nos.3 and 4), ITLOS, Order of 27/08/1999.

> may become seriously threatened". Article 116, in association with the Part V articles mentioned above, has been stated to point to the precautionary "principle" of fisheries management, while article 119 has been said to reflect a precautionary "approach" "when scientific data is not available or is inadequate to enable comprehensive decision-making" (Virginia Commentary, Vol. IV, pp.288, 310). Most of these are the very provisions before this Tribunal today. Strikingly, also, article 290, paragraph 1's reference to serious harm to the marine environment as a basis for provisional measures also underscores the salience of the approach."

Pursuant to Article 5, paragraph (c), of the UN "*Fish Stocks Agreement*"[182] of 04/12/1995, in order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall apply the *precautionary approach* in accordance with article 6. While Article 6 (Application of the precautionary approach), paragraph 1, obliges States Parties to apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment, paragraph 2 requires States to be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.[183] In accordance with Article 6, paragraph 6, of the 1995 Agreement, cautious conservation and management measures, including, *inter alia*, catch limits and effort limits are required in case of new or exploratory fisheries. Consequently, Article 6 has to be applied in the light of the general principles, which include the precautionary approach itself, provided in Article 5 of the Agreement. Article 5 emphasizes a proper balance between sustainability and utilization and stresses ecosystem protection based on precaution and best scientific evidence.[184] Furthermore, Annex II to this Agreement sets forth "guidelines" for the application of the precautionary approach.[185] It has been argued

182 "*Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*", adopted on 04/08/1995 by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks at New York, opened for signature on 04/12/1992 and entered into force on 11/12/2001, United Nations, Doc. A/CONF.164/37; reproduced in, 34 ILM 1542 (1995).

183 Article 6, paragraph 3, of the 1995 "Fish Stocks Agreement" reads as follows: "In implementing the precautionary approach, States shall: (a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty; (b) apply the guidelines set out in Annex II and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded; (c) take into account, inter alia, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and (d) develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans which are necessary to ensure the conservation of such species and to protect habitats of special concern".

184 David Freestone, 'Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement', in E. Hey (ed) *Developments in International Fisheries Law* (Kluwer Law International 1999) 287, 315-316.

185 Lawrence Juda, 'The United Nations Fish Stocks Agreement', in Olav Schram Stokke and Øystein B. Thommessen (eds) *Yearbook of International Co-operation on Environment and Development 2001/2002*, (London, Earthscan Publications 2001) 53, 54, 57.

that "the introduction of the precautionary approach represents a major change in the traditional approach of fisheries management, which until recently tended to react to management problems only after they reached crisis levels. The new regime will allow States and regional fisheries bodies to justify proactive measures more easily".[186]

The "*Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*"[187], adopted at Honolulu on 05/09/2000, establishes a regional Commission charged with various functions. In carrying out its functions the Commission has to consider a precautionary approach. Pursuant to Article 6, paragraph 2, of the 2000 Honolulu Convention, absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

Note that the Protocol of 07/11/1996[188] to the London Dumping Convention of 29/12/1979 had made an important innovation by introducing the "precautionary approach" in Article 3, which provides: "appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects". According to some authors, the precautionary approach was strongly indicated here by the words 'shall apply', which were used "presumably to compensate for the enlarged list of wastes exempt from a general prohibition of dumping in Annex 1".[189]

Preamble paragraph 5 of the "*Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean*"[190] ("Specially Protected Areas Protocol")

186 European Parliament, Directorate-General for Research, '*Working Paper: The Implications of the UN Fish Stocks Agreement (New York, 1995) for Regional Fisheries Organisations and International Fisheries Management*' (authors: C. Hedley, E.J. Molenaar, A.G. Elferink) (2003) 12. The Working Paper is also accessible at, <http://www.oceanlaw.net/projects/consultancy/pdf/ep2003.pdf>

187 The "*Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*", done at Honolulu on 05/09/2000 and entered into force on 19/06/2004; *reproduced in*, 40 ILM 278 (2001); (2001) 95 (1) AJIL 152-155.

188 The "*Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*" was adopted on 07/11/1996 by the Special Meeting of Contracting Parties to the 1972 London Convention, and entered into force on 24/03/2006; IMO document LC/SM 1/6 of 14 November 1996; reproduced in, 36 ILM 7 (1997). The objectives of the 1996 Protocol are to protect and preserve the marine environment from all sources of pollution and take effective measures, according to scientific, technical and economic capabilities of the Parties, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter, (Article 2). The 1996 Protocol supersedes the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, between Contracting Parties to this Protocol which are also Parties to the Convention, (Article 23). Thus the 1996 Protocol is in fact an entirely new convention, modifying and adding to virtually every aspect of the 1972 London Convention. On the 1996 Protocol, see, Erik Jaap Molenaar, 'The 1996 Protocol to the 1972 London Convention' (1997) 12 (3) Int'l J. Marine & Coastal L 396, 398.

189 Molenaar (n 188) 399.

190 The "*Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean*" was adopted on 10/06/1995 by the Conference of Plenipotentiaries for the Protection of the Mediterranean Sea against Pollution and its Protocols, held in Barcelona, and entered into force on 12/12/1999. In accordance with Article 32, the 1995 Protocol replaces the 1982 Protocol concerning Mediterranean Specially Protected Areas. The Annexes to the 1995 Protocol were adopted on 24/11/1996 by the Meeting of Plenipotentiaries on the Annexes to the Protocol concerning Specially Protected

of 10/06/1995 provides that "when there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be invoked as a reason for postponing measures to avoid or minimize such a threat".

The "Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal" does not mention the precautionary principle. However, Article 4, paragraph 3(f) and (h) of the "*Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa*"[191] of 29/01/1991 emphasizes the principle. Some authors argue that treaties dealing with hazardous waste consistently score in the stronger range among the elements of the precautionary principle.[192] Article 4, paragraph 3 (f), of the Bamako Convention provides that State Parties should adopt and implement "the preventive, precautionary approach to pollution which entails, *inter alia*, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm".

The "Convention on International Trade in Endangered Species"[193] (CITES) of 03/03/1973 does not refer to the precautionary principle. However, like other nature conservation treaties, it may be argued that the precautionary principle has been implicit in the CITES, especially with respect to Appendix II.[194] In the ninth meeting of the Conference of the Parties held in November 1994 the Parties agreed to apply the precautionary principle. The Resolution adopted at that meeting recognizes that "by virtue of the precautionary principle, in cases of uncertainty, the Parties shall act in the best interest of the conservation of the species when considering proposals for amendment of Appendices I and II" and decides that "when considering any proposal to amend Appendix I or II the Parties shall apply the precautionary principle so that scientific uncertainty should not be used as a reason for failing to act in the best interest of the conservation of the species".[195]

Article 2, paragraph 5/a, of the ECE "*Convention on the Protection and Use of Transboundary Watercourses and International Lakes*"[196] of 17/03/1992 provides

Areas and Biological Diversity in the Mediterranean, which was held in Monaco.

191 The "*Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa*" of 29/01/1991; reproduced in, 30 ILM 773 (1991).

192 Applegate (n 146) 23; Katz (n 164) 957.

193 The "*Convention on International Trade in Endangered Species of Wild Fauna and Flora*" was adopted on 03/03/1973 and entered into force on 01/07/1975; 993 UNTS 243; *reproduced in*, 12 ILM 1085 (1973); (1974) 68 (1) AJIL 197

194 McIntyre and Mosedale (n 109) 227; Dickson (n 147) 211-228.

195 Resolution of the Conference of the Parties: Criteria for Amendment of Appendices I and II, agreed at the Ninth Meeting of the Conference of the Parties, Fort Lauderdale (US), 7-18 November 1994, cited in, McIntyre and Mosedale (n 109) 227.

196 The UN/ECE "*Convention on the Protection and Use of Transboundary Watercourses and International Lakes*" was adopted at Helsinki on 17/03/1992 and entered into force on 06/10/1996, United Nations, Doc. E/ECE/1267; *reproduced in*, 31 ILM 1312 (1992). With respect to the States' duty to protect the ecosystems of international watercourses one may note, among others, the UN "*Convention on the Law of the Non-navigational Uses of International Watercourses*" of 21/05/1997, especially see, Articles 20 and 23 of this Convention.

that, in taking all appropriate measures to prevent, control and reduce transboundary impact, States Parties shall be guided by, *inter alia*, "the *precautionary principle*, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proven a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand." One author in the early 1990s draws attention to the fact that "the obligation not to cause harm to another State offers no protection, in and of itself, to the ecosystem of the international watercourse in question. Especially where water moves from one State into another (whether in a river or underground), protection of the flora and fauna of an international watercourse is achieved, if at all, only indirectly, via the legal protection afforded States. This approach permits States to exploit an international watercourse and its waters up to the point that harm is caused to another country".[197]

According to Article 5, paragraph (a), of the ECE "Protocol on Water and Health"[198] of 17/06/1999, in taking measures to implement this Protocol, the Parties shall be guided, among others, by the precautionary principle. It reads: "The *precautionary principle*, by virtue of which action to prevent, control or reduce water-related disease shall not be postponed on the ground that scientific research has not fully proved a causal link between the factor at which such action is aimed, on the one hand, and the potential contribution of that factor to the prevalence of water-related disease and/or transboundary impacts, on the other hand".

The Helsinki "*Convention on the Protection of the Marine Environment of the Baltic Sea*"[199] of 09/04/1992 revises the "Convention on the Protection of the Marine Environment of the Baltic Sea Area", signed again in Helsinki on 22/03/1974, the latter of which ceased to apply upon the entry into force of the new Convention, (Article 36, paragraph 4). Article 3 (Fundamental Principles and Obligations), paragraph 2, of the 1992 Helsinki Convention provides that "the Contracting Parties shall apply the *precautionary principle*, i.e., *to take preventive measures when there is reason to assume that* substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea *even when there is no conclusive evidence of a causal relationship between inputs and*

197 McCaffrey (n 169) 1006-1007.

198 Furthermore, Article 5, paragraph (e), of the "Protocol on Water and Health" of 17/06/1999 states that "preventive action should be taken to avoid outbreaks and incidents of water-related disease and to protect water resources used as sources of drinking water because such action addresses the harm more efficiently and can be more cost-effective than remedial action".

199 The "*Convention on the Protection of the Marine Environment of the Baltic Sea*" was signed on 09/04/1992 and entered into force on 17/01/2000; available at, <http://untreaty.un.org/unts/144078_158780/15/3/6512.pdf>. Pursuant to Article 2, paragraph 1, of the 1992 Convention, "Pollution" means introduction by man, directly or indirectly, of substances or energy into the sea, including estuaries, which are liable to create hazards to human health, to harm living resources and marine ecosystems, to cause hindrance to legitimate uses of the sea including fishing, to impair the quality for use of sea water, and to lead to a reduction of amenities.

their alleged effects". (Emphasis added). Article 3, paragraph 3 of the Convention obliges Parties to promote the use of Best Environmental Practice and Best Available Technology, as described in Annex II of the Convention; paragraph 4 indicates the polluter-pays principle; and paragraph 6 imposes the duty upon the Parties not to cause transboundary pollution in areas outside the Baltic Sea area. Pursuant to Article 28, the Annexes attached to this Convention form an integral part of this Convention. Under Annex II ("Criteria for the Use of Best Environmental Practice and Best Available Technology"), Regulation 2- Best Environmental Practice, paragraph 2 provides that "in determining in general or individual cases what combination of measures constitute Best Environmental Practice, particular consideration should be given to", among others, "the precautionary principle".

The "*Convention for the Protection of the Marine Environment of the North-East Atlantic*"[200] (OSPAR Convention) of 22/09/1992, which is examined below, replaces[201] the "*Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft*"[202] (Oslo Convention) of 15/02/1972 and the "*Convention for the Prevention of Marine Pollution from Land-Based Sources*"[203] (Paris Convention) of 21/02/1974. In the 1974 Paris Convention no express reference was made to the precautionary principle. This gap was filled by the Paris Commission and established by the 1974 Convention, which issued Recommendation 89/1 "*on the Principle of Precautionary Action*" on 22/06/1989. This Recommendation incorporates the principle directly. The Contracting Parties "accept the principle of safeguarding the marine ecosystem of the Paris Convention area by reducing at source polluting emissions of substances that are persistent, toxic and liable to bioaccumulate by the use of best available technology and other appropriate measures. This applies especially when there is reason to assume that certain damage or harmful effects on the living sources of the sea are likely to be caused by such substances, even when there is no scientific evidence to prove a causal link between the emissions and effects ("the principle of precautionary action")…"[204] As seen, this formulation of the principle in the

200 The "*Convention for the Protection of the Marine Environment of the North-East Atlantic*" ("OSPAR Convention") was adopted on 22/09/1992; *reproduced in*, 31 ILM 1069 (1993). The Contracting Parties comprise the fifteen following governments: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom, together with the European Community. The original text was subsequently amended on 24/07/1998, updated on 09/05/2002, 07/02/2005 and 18/05/2006.

201 While Article 31, paragraph 1, of the OSPAR Convention states that "Upon its entry into force, the Convention shall replace the Oslo and Paris Conventions as between the Contracting Parties", paragraph 2 of the same Article provides: "Notwithstanding paragraph 1 of this Article, decisions, recommendations and all other agreements adopted under the Oslo Convention or the Paris Convention shall continue to be applicable, unaltered in their legal nature, to the extent that they are compatible with, or not explicitly terminated by, the Convention, any decisions or, in the case of existing recommendations, any recommendations adopted thereunder".

202 The "*Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft*" signed in Oslo on 15/02/1972 and entered into force on 06/04/1974; *reproduced in*, 11 ILM 262 (1972). The 1972 Oslo Convention was amended by the protocols of 02/03/1983 and 05/12/1989.

203 The "*Convention for the Prevention of Marine Pollution from Land-Based Sources*" signed in Paris on 21/02/1974 and entered into force on 06/05/1978; *reproduced in*, 13 ILM 352 (1974). The 1974 Paris Convention amended by the protocol of 26/03/1986.

204 Paris Commission Recommendation 89/1 on the "*Principle of Precautionary Action*" (22 June 1989). See, Gündling (n

Recommendation 89/1 in fact repeated the provision of the Final Declaration of the Second International North Sea Conference (London Declaration of 1987), which is already noted above. Furthermore, the Paris Commission, again on 22/06/1989, issued another Recommendation 89/2 on the use of the "best available technology" which implies the precautionary principle.[205]

Like the 1974 Paris Convention, the 1972 Oslo Convention on dumping did not explicitly recognize the precautionary principle. However, a similar approach was also adopted by the Oslo Commission, established by the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft. On 14/06/1989, the Oslo Commission issued Decision 89/1 on the "*Reduction and Cessation of Dumping Industrial Wastes at Sea*" in which the precautionary principle was implicitly adopted.[206]

The purpose of the "*OSPAR Convention*"[207] of 22/09/1992 was to create a comprehensive regime in a single legal instrument for the protection of the marine environment of the north-east Atlantic and Arctic oceans from pollution by the previously covered sources, as well as from other adverse effects of human activities.[208] Article 2, paragraph 2(a), of the 1992 OSPAR Convention reads as follows: "The Contracting Parties shall apply: (a) *the precautionary principle, by virtue of which preventive measures are to be taken* when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, *even when there is no conclusive evidence of a causal*

127) 28; Hayward (n 132) 93; Cameron and Abouchar (n 129) 15; McIntyre and Mosedale (n 109) 225. In addition to Rec. 89/1 the authors also refer to the Paris Commission Recommendation 90/1 on the "*Definition of the Best Available Technology for Secondary Iron and Steel Plants*", which provided the first steps for a more concrete application of the precautionary principle by defining the best available technology for iron and steel industries.

205 Paris Commission Recommendation 89/2 on the use of the "*Best Available Technology*" (22 June 1989). Gündling (n 127) 28. The author stated that the definition given for the 'best available technology' "makes express reference to the 'precautionary principle', and the final clause provides that the application of the 'best available technology' has to lead to an improvement of the environment", *ibid*. On the other hand, McIntyre and Mosedale referred to Paris Commission Recommendation 90/1 on the "*Definition of the Best Available Technology for Secondary Iron and Steel Plants*", which provided the first steps for a more concrete application of the precautionary principle by defining the best available technology for iron and steel industries; See, McIntyre and Mosedale (n 109) 225.

206 Oslo Commission Decision 89/1 on the "*Reduction and Cessation of Dumping Industrial Wastes at Sea*" (14 June 1989), cited in Cameron and Abouchar (n 129) 15. The authors stated that "the Oslo Commission has implicitly adopted the precautionary principle. In a decision on the reduction and cessation of dumping industrial wastes at sea, the Commission decided that no dumping should occur 'except for inert materials of natural origin' which would 'cause no harm to marine environment, (provided that) there be no practical alternatives on land'…" ; Also see, McIntyre and Mosedale (n 109) 225. The authors stated that "the Oslo Commission's Prior Justification Procedure has been described as 'a most rigorous application of the precautionary principle', in that it places on the party applying to dump industrial wastes the burden of proving 'both that are no practical alternatives on land and that the materials cause no harm in the marine environment'…", *ibid*; Further see, Hayward (n 132) 96.

207 Analysis on the OSPAR Convention, see, Ellen Hey - Ton IJIsra - Andre Nollkaemper, '*The 1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic: A Critical Analysis*' (1993) 8 (1) Int'l J. Marine & Coastal L. 1; Louise de la Fayette, '*The OSPAR Convention Comes into Force: Continuity and Progress*' (1999) 14 (2) Int'l J. Marine & Coastal L. 247, 263-265.

208 Fayette (n 207) 250.

relationship between the inputs and the effects…"[209] (Emphasis added). It was argued that the mandatory prescription of the precautionary principle in itself is an important achievement.[210] This provision means that "a Contracting Party which opposes the taking of preventive measures cannot argue against taking those measures because there is lack of conclusive scientific evidence about the effects of those activities. The last phrase of Article 2(2) (a), in fact, somewhat shifts the burden of proof between those Contracting Parties advocating protective measures and those advocating that more information is required prior to taking such measures."[211] The formulation of the precautionary principle in the OSPAR Convention is significant for the following reasons: As La Fayette listed, first, unlike some other previous definitions of this principle, this is an active formulation; it requires preventive measures to be taken when there is a reasonable apprehension of a hazard. Secondly, unlike, for example, Principle 15 of the Rio Declaration, it does not require the potential damage to be serious or irreversible before action is taken. Thirdly, the formulation does not even require "damage", but only the possibility of a "hazard", which is the mere risk that damage might occur. Fourthly, unlike Principle 15 of the Rio Declaration, there is no requirement for preventive measures to be "cost-effective".[212]

The "*Convention for the Protection of the Mediterranean Sea against Pollution*"[213] of 16/02/1976 did not include a precise provision on the precautionary principle. Although the precautionary principle was lacking in the 1976 Convention, the principle was subsequently introduced to the Convention system by the Contracting Parties. Indeed, in their sixth meeting held in October 1989, the contracting parties agreed "*to fully adopt the principle of precautionary approach* regarding the prevention and elimination of contamination in the Mediterranean Sea area…" and requested the Secretariat "to review the Dumping Protocol… in order to identify any necessary amendments".[214]

The 1976 Convention was subsequently replaced by the "*Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*" of 10/06/1995. The precautionary principle appears in the 1995 Convention. Pursuant to Article 4, paragraph 3(a), the Contracting Parties shall "apply, in accordance with

209 Also see, Article 2, paragraph 1(a), of the OSPAR Convention: "The Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected".

210 Hey - IJIsra – Nollkaemper (n 207) 11.

211 *Ibid* 12.

212 Fayette (n 207) 254-255.

213 The "Convention for the Protection of the Mediterranean Sea against Pollution", adopted on 16/02/1976 and entered into force on 12/02/1978.

214 Sixth Meeting of the Contracting Parties to the Convention for the Protection of the Mediterranean Sea against Pollution, *Recommendations Approved by the Contracting Parties* (October 1989), cited in, Cameron and Abouchar (n 129) 15; Also see, McIntyre and Mosedale (n 109) 225.

their capabilities, the precautionary principle, by virtue of which where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". Consequently, the insertion of sub-paragraph (a) to paragraph 3 of Article 4 is one of the significant contributions that was made by the 1995 Convention. It follows that the inclusion of an explicit and specific provision on precautionary principle into the 1995 Convention seems to be a consequence of the steps taken in 1989 by the Contracting Parties of the original 1976 Convention.

The "*Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities*"[215] of 07/03/1996 was based on the original 1980 Protocol on Land-Based Sources. In preamble paragraph 5 of the 1996 "Protocol on Land-Based Sources and Activities" the Parties declared that they were "*applying* the precautionary principle and the polluter pays principle, undertaking environmental impact assessment and utilizing the best available techniques and the best environmental practice, including clean production technologies", as provided for in article 4 of the "Convention for the Protection of the Mediterranean Sea against Pollution", adopted on 16/02/1976 and amended on 10/06/1995.

Furthermore, the "*Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea*"[216] of 25/06/2002 in preambular paragraph 10, refers to Article 4 of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean of 10/06/1995, and states the following: "The Contracting Parties to the present Protocol, … Applying the *precautionary principle*, the polluter pays principle and the method of environmental impact assessment, and utilizing the best available techniques and the best environmental practices…".

iv. The principle in recent instruments

The following more recent instruments do not only insert provisions on the precautionary principle, but also make clear references to Principle 15 of the Rio Declaration. For example:

215 The "*Protocol on Land-Based Sources*" (the LBS Protocol) was adopted on 17/05/1980 by the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea Against Pollution from Land-based Sources, held in Athens. The 1980 Protocol entered into force on 17/06/1983. The original 1980 LBS Protocol was modified by amendments adopted on 07/03/1996 by the Conference of Plenipotentiaries on the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources, held in Syracuse on 6 and 7 March 1996 (UNEP(OCA)/MED IG.7/4). The amended Protocol recorded as "Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities".

216 The "*Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea*", done at Valletta, Malta, on 25 January 2002.

In the preamble paragraph 4 of the "*Cartagena Protocol on Biosafety*"[217] of 29/01/2000 the Parties reaffirmed "the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development". Article 1 provides that "in accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements". The Cartegena Protocol[218] has three annexes. "Annex III. Risk Assessment", paragraph 4, indicates that "lack of scientific knowledge or scientific consensus should not necessarily be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable risk".[219] Some examples of instruments which are comparable to the 2000 Cartagena Protocol are, the 1973 CITES, the 1987 Montreal Protocol on substances that deplete the Ozone Layer, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1998 Rotterdam Convention on PIC-Procedure (prior informed consent procedure) for Certain Hazardous Chemicals and Pesticides in International Trade, and the 2001 Convention on Persistent Organic Pollutants.[220]

The precautionary principle was incorporated into the Protocol in an effort to reduce the risk of scientifically uncertain dangers. In the context of the Protocol, "this principle allows a country to reject imports of living modified organisms even if there is scientific uncertainty that the organisms will cause any harm".[221] But there are views that the precautionary principle was not sufficiently defined in the

217 The "*Cartagena Protocol on Biosafety to the Convention on Biological Diversity*", adopted at Montreal on 29/01/2000, and entered into force on 11/09/2003; *reproduced in*, 39 ILM 1027 (2000); Also see, Article 10 (Decision Procedure), paragraph 6, of the Protocol which reads as follows: "Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question… in order to avoid or minimize such potential adverse effects". Further see, Article 11, paragraph 8, which uses the same formulation with a change in the last part of the provision: "…with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects".

218 Veit Koester, "*Cartagena Protocol: A New Hot Spot in the Trade-Environment Conflict?*" (2001) 31 (2) Envtl. Pol'y & L. 82 (For the negotiations and the content of the Protocol, see *ibid* 82-85); Veit Koester, '*The Compliance Mechanism of the Cartagena Protocol on Biosafety: Development, Adoption and First Five Years of Life*' (2009) 18 (1) RECIEL 77.

219 Also see, "Annex III", paragraph 8 (f): "Where there is uncertainty regarding the level of risk, it may be addressed by requesting further information on the specific issues of concern or by implementing appropriate risk management strategies and/or monitoring the living modified organism in the receiving environment".

220 Koester (n 218) 92.

221 Katz (n 164) 950 (The author's general thesis was that "the most strict embodiments of the precautionary principle are inappropriate to address the risks of agricultural biotechnology and that the principle may not be appropriate at all"; *ibid* 951; Further see, Robert Falkner, '*Regulating biotech trade: the Cartagena Protocol on Biosafety*' (2000) 76 (2) International Affairs 299; also available at <https://www.cbd.int/doc/articles/2002-/A-00143.pdf>. According to Falkner, "while recognizing the potential benefits of biotechnology trade, the treaty strengthens the application of the precautionary principle in this area and explicitly states that trade and environment agreements 'should be mutually supportive'…", *ibid* 299-300).

Protocol[222] and also that there is a lack of clarity regarding how the principle will be implemented.[223]

While preambular paragraph 8 of the "Stockholm Convention on POPs" of 22/05/2001 affirms that "precaution underlies the concerns of all the Parties and is embedded within the Convention", Article 1 reads as follows: "Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants".

The preamble paragraph 11 of the "Protocol on PRTRs" of 21/05/2003 (entered into force on 08/10/2009) declared that the Parties were "*wishing also* to ensure that the development of such systems takes into account principles contributing to sustainable development such as the precautionary approach set forth in principle 15 of the 1992 Rio Declaration on Environment and Development". Moreover, Article 3, paragraph 4, of the Protocol provides that "in the implementation of this Protocol, each Party shall be guided by the precautionary approach as set forth in Principle 15 of the 1992 Rio Declaration on Environment and Development".

Article IV of the Revised African Conservation Convention of 11/07/2003 requires Parties to adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through the application of the precautionary principle.

v. The principle in international jurisprudence

Furthermore, notwithstanding whether it has explicitly or implicitly been emphasized the precautionary approach also appears in separate or dissenting opinions of the judges of the ICJ.

For example, as indicated by the ICJ in the "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)" Order of 22/09/1995, in its "Request for an Examination of the Situation" (Application instituting proceedings) of 21/08/1995 New Zealand contended "that, both by virtue of specific treaty undertakings (…) and customary international law derived from widespread international practice, France has an obligation to conduct an *environmental impact assessment* before carrying out any further nuclear tests at Mururoa and Fangataufa" and "that France's conduct is illegal in that it causes, or is likely to cause, the introduction into marine environment of radioactive material, France being under an obligation, before carrying out its new underground nuclear tests, to provide evidence

222 Falkner (n 221) 300.

223 Katz (n 164) 954.

that they will not result in the introduction of such material to that environment, in accordance with the '*precautionary principle*' very widely accepted in contemporary international law", (Order, para.5).[224] (Emphasis added).

Thus, New Zealand in that context emphasized obligation imposed upon France under international law. These obligations were supported by reference to treaty law and customary international law. New Zealand specifically referred to Article 16 of the 1986 Noumea Convention, which placed France under obligation to conduct a prior *environmental impact assessment* if it were to resume its nuclear testing program. This obligation, in the view of New Zealand, was supported by the application of *precautionary principle*.[225]

Moreover, in its oral statements New Zealand further contended "that… under current customary law, especially stringent controls applied to the marine environment, so that, in general, the introduction of the radioactive material into the marine environment was forbidden; and that specifically 'any introduction of radioactive material into the marine environment as a result of nuclear tests' was forbidden; that the standard of proof to which New Zealand should be subject in seeking to demonstrate that France was in breach of its obligations was a prima facie test; and that by virtue of the *adoption into environmental law of the 'Precautionary Principle'*, the burden of proof fell on a State wishing to engage in potentially damaging environmental conduct to show in advance that its activities would not cause contamination", (Order, para.34). In its oral statements New Zealand reiterated "that Article 16 of (the Noumea) Convention[226] required the carrying out of an environmental impact assessment before any major project 'which might affect the marine environment' was embarked upon; that a similar obligation existed under customary law; that, moreover, such obligation was not subject to any exception recognized in international law concerning national security; that *the Precautionary Principle required* France *to carry out such an assessment as a precondition for undertaking the activities, and to demonstrate that there was no risk associated with them*…", (Order, para.35). (Emphasis added).

New Zealand in its "Request for an Examination of the Situation" of 21/08/1995, among others, also specifically invoked the precautionary principle (Application, paras.105-110). [227] New Zealand argued that "there has emerged a very widely

224 "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)", Order of 22/09/1995 [1995] ICJ Rep para 5, 34-35.

225 Allan M. Bracegirdle, '*Case Analysis: Case to the International Court of Justice on Legality of French Nuclear Testing*' (1996) 9 (2) Leiden JIL 431, 438.

226 The "*Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*" ("Noumea Convention"), adopted at Noumea on 24/11/1986, and entered into force 22/08/1990; *reproduced in*, 26 ILM 38 (1987).

227 "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)* Case, *Application instituting proceedings* (*Request for an Examination of the Situation*), 21 August 1995, 53-57, para 105-110.

accepted and operative principle of international law referred to as 'precautionary principle'. This has the effect that in situations that may possibly be significantly environmentally threatening, the burden is placed upon the party seeking to carry out the conduct that could give rise to environmental damage to prove that that conduct will not lead to such a result", (*Application*, para.105).

In his Dissenting Opinion appended to the "(*New Zealand v. France*)" Order of 22/09/1995, Judge Koroma stated that "the evidence, though not conclusive, is sufficient to show that a risk of radioactive contamination of the marine environment may be brought about as a result of the resumed tests. The Court should have taken cognizance of the legal trend prohibiting nuclear testing with radioactive effect, and it should have proceeded to an examination of the situation within the framework of the 1973 *Nuclear Tests* case."[228]

Judge Palmer, in his Dissenting Opinion appended to the ICJ Order of 22/09/1995, stressed both the precautionary approach and the principle environmental impact assessment in the following words: "*(c)* customary international law may have developed a norm of requiring environmental impact assessment where activities may have a significant effect on the environment; *(d)* the norm involved in the *precautionary principle* has developed rapidly and *may now be a principle of customary international law* relating to the environment; *(e)* there are obligations based on Conventions that may be applicable here requiring environmental impact assessment and the precautionary principle to be observed", (para.91/c-e).[229] (Emphasis added).

In the "*Gabcikovo-Nagymaros Project* (*Hungary v. Slovakia*)" case the Court rendered its judgment on 25/09/1997.[230] Hungary, in its *Memorial*[231] of May 1994, directly referred, *inter alia*, to the precautionary principle:

> "The precautionary principle is the most developed form of the general rule imposing the obligation of prevention. Its proclamation at a universal level can be considered one of the most important results of the 1992 Rio de Janeiro Declaration on Environment and Development", (*Memorial* of Hungary, p.201, para.6.64). "Almost no new international instrument, whether regional or universal, drafted since 1989, ignores the precautionary principle", (p.202, para.6.65). "The effective application of the obligation of prevention can be jeopardized, due to scientific uncertainty, and this can result in irremediable environmental damage. Thus, action must be taken at an early

228 "Dissenting Opinion of Judge Koroma" appended to "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)", Order of 22/09/1995, [1995] ICJ Rep, 379.

229 "Dissenting Opinion of Judge Sir Geoffrey Palmer" appended to "*Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v. France*)", Order of 22/09/1995 [1995] ICJ Rep 412, para 91.

230 (*Hungary v. Slovakia*) (n 93).

231 "*Case concerning the Gabcikovo-Nagymaros Project* (*Hungary v. Slovakia*)", Memorial of the Republic of Hungary, [1994] 1 ICJ Rep 1, 201-203, 252.

> stage based upon models of potential consequences. This is the precautionary principle. As an aspect of the obligation of prevention, the precautionary principle seeks to avoid serious environmental damage. It is of particular cogency when there is a danger that the deterioration of the environment would be irreversible" (p.202, para.6.67). "One of the implications of the precautionary principle is that the causal link may be assumed in situations even in the absence of scientific certainty. Combined with the general obligation not to cause damage to another country's environment, this means that the State whose activities are likely to damage the environment of another State must show that the proposed action will not have such effects. If this cannot be done, the proposed activity must be modified or even abandoned", (pp.202-203, para.6.68).
>
> In that context Hungary concluded: "In the proposals made to the Czechoslovak Government to investigate the environmental problems caused by implementation of the Barrage System, the Hungarian Government referred to the precautionary principle and to the irreversibility of the damage that could result from the construction. Having ignored its demands and refused to take the necessary precautionary measures, Czechoslovakia was in breach of the obligation to prevent serious environmental harm", (p.203, para.6.69).
>
> Hungary further argued that "It may be difficult to offer proof for al1 possible or potential damages. Indeed, the damming of a massive international river is precisely the type of hazardous situation that entails potential damage, the full extent of which cannot be demonstrated at this time. This is the core reason why the precautionary principle is gaining increasing authority in the legal concerns and practice of States", (p.252, para.8.31).

Despite Hungary's lengthy arguments based on the precautionary principle submitted in its *Memorial* of 1994, the ICJ in its "*Gabcikovo-Nagymaros Project* (*Hungary v. Slovakia*)" Judgment of 25/09/1997 referred to the principle only in two paragraphs. The first was the one where it summarized Hungary's contention. The Court said: "Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle'…", (Judgment, para.97). The second reference to the principle appears in (para.113) of the Judgment in which the Court stated the following: "The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position".[232]

232 (*Hungary v. Slovakia*) (n 93) para 97, 113.

In his Separate Opinion[233] appended to the "*Gabcikovo-Nagymaros*" Judgment of 25/09/1997, Judge Weeramantry also refers to the applicability of the principle of the "precautionary approach" either in connection with the principle of "sustainable development" or "environmental impact assessment". He further underlines "the general principle of caution".[234] Judge Koroma in his Separate Opinion appended to the same Judgment concludes that "the importance of the river Danube for both Hungary and Slovakia cannot be overstated. Both countries, by means of the 1977 Treaty, had agreed to co-operate in the exploitation of its resources for their mutual benefit. *That Treaty*, in spite of the period in which it was concluded, *would seem to have incorporated most of the environmental imperatives of today, including the precautionary principle*, the principle of equitable and reasonable utilization and the no-harm rule. None of these principles was proved to have been violated to an extent sufficient to have warranted the unilateral termination of the Treaty".[235] (Emphasis added). Thus, Judge Koroma not only recognizes the precautionary principle but also regards it as one of the environmental imperatives that has already been incorporated into international environmental law.

Some authors commented that "the Court's decision may foreshadow a bleak future for the precautionary principle, at least with respect to its application in the context of pre-existing agreements… The principle is new, and thus it is not surprising that the Court did not mention it. It is somewhat disappointing, however, especially as this principle might have offset the need for 'imminence' which the Court stressed in its rejection of Hungary's state of necessity argument as a ground for suspending work on the Project".[236] However, as examined below in this study, this Judgment inserted three basic international environmental protection principles, i.e., the principles of "sustainable development", "transboundary damage and jurisdiction" and, at least implicitly, the "precautionary principle" into the jurisprudence of the Court. In particular the pronouncements in paragraphs 55 and 57 of the Judgment may also be construed as an indirect recognition of precautionary principle.

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233 "Separate Opinion of Vice-President Weeramantry" appended to "*Gabcikovo-Nagymaros Project Case*", ICJ Judgment of 25/09/1997, [1997] ICJ Rep 88, 93-94, note 14 (Judge Weeramantry refers to the 1990 Dublin Declaration by the European Council on the Environmental Imperative *(Bulletin of' the European Communities,* 6, 1990, Ann. II. p.18) "As Heads of State or Government of the European Community, …[w]e intend that action by the Community and its Member States will be developed… on the principles of sustainable development and preventive and precautionary action", (*ibid,* Conclusions of the Presidency, Point 1.36, *ibid* 17-18); Also see, Separate Opinion, *ibid* 111. Among others he also refers to the 1985 EC Environmental Assessment Directive (Art.3); and noted that "the status of the principle in actual practice is indicated also by the fact that multilateral development banks have adopted it as an essential precaution (World Bank Operational Directive 4.00)".

234 *Ibid* 113.

235 "Separate Opinion of Judge Koroma" appended to "*Gabcikovo-Nagymaros Project Case*", ICJ Judgment of 25/09/1997, [1997] ICJ Rep. 112, 152.

236 Ida Bostian, 'Flashing the Danube: The World Court's Decision Concerning the Gabcikovo Dam' (1998) 9 (2) Colo. J. Int'l Envtl. L. & Pol'y 401, 425.

vi. The status of the principle in international law

In addition to the jurisprudence of international courts and tribunals, legally binding instruments clearly and repeatedly indicate "precautionary approach or principle" either by also referring to the Rio Declaration or simply citing the principle itself. It may be safe to conclude that this principle is now incorporated into the corpus of international environmental law.

It has been argued that the key issue that now has to be resolved is the implementation of the precautionary principle.[237]

Although some authors argue that "more clarity is preferable at the international level before the precautionary principle can adequately fulfill the position of a binding customary norm in international law"[238], that this principle has now been expressed in a number of treaties and there exists sufficient state practice to conclude that it has gained broad acceptance on the international level[239] or that "if the present trends continue, the precautionary principle could become *the* fundamental principle of environmental protection policy and law at the international, regional and local levels"[240] (emphasis original), or that "many scholars view these policy statements as evidence that the precautionary principle finally has begun to emerge as customary international law. Nonetheless, the realities of current international environmental politics preclude it from, as yet, being a customary norm"[241], or "the numerous and in some cases elaborate instruments do not justify the conclusion that there exists a norm of general international law requiring the application of the principle of precautionary action"[242], there are also views that the precautionary concept has been considered as customary international law.[243] Some authors clearly argued that "the precautionary principle has indeed crystallized into a norm of customary international law" and that "effective and satisfactory implementation of the principle can be achieved, *inter alia*, by means of, where appropriate, precautionary assessment, the setting of precautionary standards and the discharge of ancillary informational obligations".[244]

237 Freestone & Hey (n 147) 14.

238 Mead (n 139) 167 (But the author added that the precautionary principle "will soon become a norm of customary international law", *ibid* 176. The author also stated that "there is considerable evidence, when looking at the implementation of the precautionary principle in multilateral agreements that it has 'crystallized' into a rule of customary law"; *ibid* 165).

239 Sands (n 129) 299-300.

240 Cameron and Abouchar (n 129) 27. The authors also stated that "backed by political will, the precautionary principle is now emerging as a principle of law", *ibid* 4.

241 MacDonald (n 129) 269.

242 Gündling (n 127) 30; Also see, Katz (n 164) 951 (According to the author, "the widespread use of the precautionary principle makes it seem more like a 'sound bite' rather than a principle rooted in the law. It is often included in agreements without much explanation of the impact it should have or how it should be implemented").

243 Hey (n 139) 303, 307; Yoshida (n 175) 121 (According to the author "the precautionary principle can be seen as a gradual development or an effective modification of the 1972 Stockholm Declaration's Principle 21, which is currently perceived to be a binding legal obligation").

244 McIntyre and Mosedale (n 109) 223, 241; Also see, David Freestone, 'The Road from Rio: International Environmental Law After the Earth Summit' (1994) 6 (2) J. Envtl. L. 193, 209-215; Cameron and Abouchar (n 147) 36-52 (The authors conclude that the widespread inclusion of the precautionary principle in international agreements shows that it is customary

Some others argue that at the very least the precautionary principle is an "evolving norm of customary international law".[245] As one commentator observed "recent international agreements treat the precautionary principle (PP) as a binding legal instrument. Whereas earlier international environmental agreements included the PP only in their preambles, more recent agreements… include the PP as an operational requirement in the main body of the treaty text". This development does suggest that the principle has been "crystallized into a binding norm of customary international law as a result of its frequent inclusion in international environmental agreements and national regulatory decisions".[246]

It follows that when requests for the indication of interim measures have been considered by international tribunals or courts (or quasi judicial convention organs, as may be the case under international human rights law), among others, this principle might be one of the elements which has to be taken into account by the said organs in assessing such requests. As examined below, provisional measures orders prescribed by ITLOS in fact clearly show this principle or approach has been discussed by the judges of that Tribunal.

5. Environmental impact assessment (EIA) principle

i. Recognition and scope of the EIA principle in soft and hard law instruments

The environmental impact assessment (EIA) principle was first established in domestic law under the 1969 National Environmental Policy Act of the United States.[247]

At international level the United Nations General Assembly resolution 2995 (XXVII), 1972 was one of the early soft law documents.[248] The 1978 UNEP *Draft*

law).

245 Simon Marr, *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law* (New York, Martinus Nijhoff Publishers 2003) 202 (But the author also noted the following: "However, the precautionary principle shifts the burden for proving harmlessness to those states that wish to engage in the environmentally sensitive activity. Thus it is of predominant interest whether the precautionary principle as a rule of customary international law, provides for this shift in the burden of proof", *ibid*); Further see, Mead (n 139) 163.

246 Marchant (n 146) 1801 (However, the author also added that "the PP is too vague and underspecified to serve as a legally binding decision-making rule. Yet, in every jurisdiction in which the PP has been enacted, it is increasingly assuming the status of a binding legal rule. Applying the PP in this mode will result in real and perceived arbitrariness", *ibid* 1802. The author suggested that in order to overcome such problems the more proper policy option "is to try to better define the appropriate application of precaution", *ibid*).

247 See, Kovar (n 138) 135. Kovar noted that Principle 17 of the Rio Declaration enshrines the approach of the US "National Environmental Policy Act" of 1969, ((1988 & Supp. II 1990) 42 U.S.C. para 4321-4370a); David H. Getches, 'Foreword: The Challenge of Rio' (1993) 4 (1) Colo. J. Int'l Envtl. L. & Pol'y 1, 12; Weiss (n 56) 677; Armin Rosencranz, 'The Origin and Emergence of International Environmental Norms' (2003) 26 (3) Hastings Int'l & Comp. L. Rev. 309, 312.

248 UN General Assembly Resolution 2995 (XXVII) of 15/12/1972 on "*Co-operation between States in the field of the environment*". In (para 2) of this Resolution the GA recognized that co-operation between States in the field of environment "will be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by States within their national jurisdiction, with a view to avoiding significant harm that may occur in the

Principles of Conduct (Principle 5) proposed that "States should make an environmental impact assessment before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource". Similarly the 1981 UNEP Conclusions of the Study on the Legal Aspects concerning the Environment Related to Off-Shore Mining and Drilling within the Limits of National Jurisdiction also emphasizes the notion of environmental impact assessment.[249] These UNEP recommendations were endorsed by the UN General Assembly in its Resolution 37/217 of 20/12/1982 on "*International co-operation in the field of the environment*"[250], as well as in the UN "World Charter for Nature" of 28/10/1982, (para.11/c) which states that "activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance".[251] Paragraph 16 of the World Charter may also be cited in this context.[252] Furthermore, the UNEP Governing Council decision of 1987 on Environmental Impact Assessment in its preamble provides a definition: "Environmental impact assessment (EIA) means an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development. EIA goals and principles… are necessarily general in nature and may be further refined when fulfilling EIA tasks at the national, regional and international levels".[253] The "*Male Declaration on Global Warming and Sea Level Rise*" adopted by the Small States Conference on Sea Level Rise on 18/11/1989 called upon "all States to undertake environmental impact assessments for all development projects, review existing development programmes in terms of environmental impact assessment and strengthen environmental management capabilities", (para.5).[254]

Principle 17 of the Rio Declaration of 1992 reads as follows:

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

environment of the adjacent area".

249 *The Environment Programme: Programme Performance Report January-April 1981*, UN Doc. UNEP/GC.9/5/Add.5, 1981, p.36, cited in, Pierre-Marie Dupuy, "*Soft Law and the International Law of the Environment*" (1990) 12 (2) Mich. J. Int'l L. 420, 426.

250 UN General Assembly Resolution 37/217 of 20/12/1982 on "*International co-operation in the field of the environment*", adopted at 113th plenary meeting; especially see, para 6.

251 For the arguments in favor and against of the formulation of paragraph 11(c) of the Charter, see, Wood Jr. (n 23) 984-986.

252 The World Charter for Nature (para.16) reads as follows: "All planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and *assessments of the effects on nature of proposed policies and activities*…" (Emphasis added).

253 UNEP Governing Council decision 14/25, *Goals and Principles of Environmental Impact Assessment*, UN Doc. UNEP/GC.14/17 (1987), cited in, Cameron and Abouchar (n 129) 27, note 98.

254 "*Male Declaration on Global Warming and Sea Level Rise*" adopted by Small States Conference on Sea Level Rise on 18/11/1989, reproduced in, '*Selected International Legal Materials*' (1990) 5 Am. U. J. Int'l L. & Pol. 602.

Principle 17 of the Rio Declaration should be read in conjunction with Principle 19 (prior notification). Furthermore, Agenda 21, Chapter 7.41 (b) provides that "All countries should, as appropriate, adopt the following principles for the provision of environmental infrastructure (…) b. Ensure that relevant decisions are preceded by *environmental impact assessments* and also take into account the costs of any ecological consequences".[255]

EIA procedures are directly related to the principle of information and consultation since they make it possible to estimate the impact of a planned activity on the environment of a neighboring State.[256] "Present customary international law may oblige states to assess the transboundary impact potential and notify the results thereof to possibly affected state(s) if activities within their territory or jurisdiction carry a prima facie risk of transnationally injurious consequences".[257]

Coming to the hard-law instruments, Article 6 of the "*Nordic Environmental Protection Convention*" of 19/02/1974[258] provides that "upon the request of the supervisory authority, the examining authority shall, insofar as compatible with the procedural rules of the States in which the activities are being carried out, require the applicant for a permit to carry out environmentally harmful activities to submit such additional particulars, drawings and technical specifications as the examining authority deems necessary for evaluating the effects in the other State."

Article 206 of the 1982 UNCLOS reads as follows: "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, *assess the potential effects of such activities on the marine environment* and shall communicate reports of the results of such assessments…"

255 Also see, Agenda 21, Chapter 8.4, which reads as follows: "The primary need is to integrate environmental and developmental decision-making processes. To do this, Governments should conduct a national review and, where appropriate, improve the processes of decision-making so as to achieve the progressive integration of economic, social and environmental issues in the pursuit of development that is economically efficient, socially equitable and responsible and environmentally sound…".

256 Dupuy (n 249) 426.

257 Günther Handl, 'Environmental Protection and Development in Third World Countries: Common Destiny - Common Responsibility' (1988) 20 (3) N.Y.U. J. Int'l L & Pol. 603, 615.

258 The "*Convention on the Protection of the Environment*" ("Nordic Environment Convention") of 19/02/1974 concluded between Denmark, Finland, Norway and Sweden; *reproduced in*, 13 ILM 591 (1974). Pursuant to Article 1 of this Convention "environmentally harmful activities shall mean the discharge from the soil or from buildings or installations of solid or liquid waste, gas or any other substance into water courses, lakes or the sea and the use of land, the seabed, buildings or installations in any other way which entails or may entail environmental nuisance by water pollution or any other effect on water conditions, sand drift, air pollution, noise, vibration, changes in temperature, ionizing radiation, light etc." Among others, the recognition of noise as one of the pollution sources seems very significant especially because it appears in a Convention concluded in the early 1970s and because under international human rights law, as shown below, such specific complaints have been taken before the organs of the European Convention on Human Rights.

The Contracting Parties to the ASESAN "Agreement on the Conservation of Nature and Natural Resources"[259] of 09/07/1985 undertake that proposals for any activity which may significantly affect the natural environment shall as far as possible be subjected to an assessment of their consequences before they are adopted, and they shall take into consideration the results of this assessment in their decision-making process, (Article 14/1). Environmental impact assessment is also indicated in Article 20/3(a) of the same Agreement.[260]

In the "*Noumea Convention*"[261] of 24/11/1986, Article 16 (Environmental Impact Assessment), paragraph 2 provides that "each Party shall, within its capabilities, assess the potential effects of such projects on marine environment, so that appropriate measures can be taken to prevent any substantial pollution[262] of, or significant and harmful changes within, the Convention Area". Pursuant to paragraph 3 of the same Article, "with respect to the assessment referred to in paragraph 2, each Party shall, where appropriate, invite: (a) public comment according to its national procedures; (b) other Parties that may be affected to consult with it and submit comments. The results of these assessments shall be communicated to the Organisation, which shall make them available to interested Parties."

Article 2 and in particular Article 8 of the "Protocol to the Environmental Protection to the Antarctic Treaty" of 04/10/1991 should also be recalled with regard to environmental impact assessment. Article 8 subjects all proposed activities in Antarctica to prior environmental assessment. The threshold set by Article 8 is that of a "minor or transitory impact". This Protocol established a Committee for Environmental Protection (Article 11). One of its functions is to provide advice on the application and implementation of the environmental impact assessment procedures set out in Article 8 and Annex I, (Article 12, para.1/d). The scope and procedure of this process is set forth under eight Articles of the "Annex I – Environmental Impact Assessment" to the Protocol.[263] "One of the strengths of "Annex I" is that mandatory environmental impact assessment applies to 'any activities undertaken

259 The "*Agreement on the Conservation of Nature and Natural Resources*" was adopted at Kuala Lumpur on 09/07/1985.

260 Article 20/3(a) of the 1985 ASESAN Agreement requires the Parties "to make environmental impact assessment before engaging in any activity that may create a risk of significantly affecting the environment or the natural resources of another Contracting Party or the environment or natural resources beyond national jurisdiction".

261 The "*Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*" ("Noumea Convention" or "SPREP Convention"), adopted at Noumea on 24/11/1986, and entered into force 22/08/1990; *reproduced in*, 26 ILM 38 (1987).

262 Pollution is defined in Article 2, paragraph (f) of the "Noumea Convention" of 24/11/1986 as follows: "(f) 'pollution' means the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities…"

263 For environmental impact assessment under the 1991 Protocol, generally see, Catherine Redgwell, 'Environmental Protection in Antarctica: *The 1991 Protocol*' (1994) 43 (3) ICLQ 599, 616-622; Francesco Francioni, 'The Madrid Protocol on Protection of the Environment' (1993) 28 (1) Tex. Int'l L. J. 47, 62-66; Samuel Kwaw Nyakeme Blay, 'New Trends in the Protection of Antarctic Environment: The 1991 Madrid Protocol' (1992) 86 (2) AJIL 387-392.

in the Antarctic Treaty area'. This goes further than domestic environmental impact assessment procedures, which generally apply only to major industrial projects, and then the Espoo Convention, which focuses on transboundary effects and hence upon larger projects".[264] It is argued that mandatory environmental impact assessment confers "credibility on the system of environmental standards established in the Madrid Protocol, which, in the absence of such a procedural instrument, would have risked transformation into merely a cosmetic instrument".[265] Some authors argued that this Protocol "is in fact nothing of the kind either in its geographical scope or in the scope for global participation. The contribution of the Protocol to international environmental law is more diffuse. It contributes to the regional application and enforcement of global environmental treaties, particularly MARPOL 73/78 (Annex IV), and contributes to the emergence of new norms of customary international law, such as the precautionary principle. The Protocol supports a 'stronger version' of this principle, with activities prohibited unless it is proved that they will not cause unacceptable harm to the environment".[266]

Article 14, paragraph 1 (a), of the "*Convention on Biological Diversity*" of 05/06/1992 requires Parties, as far as possible and as appropriate, to introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity.

In accordance with Article 7, paragraph 1, of the Helsinki "*Baltic Sea Convention*" of 09/04/1992, "whenever an environmental impact assessment of a proposed activity that is likely to cause a significant adverse impact on the marine environment of the Baltic Sea Area is required by international law or supra-national regulations applicable to the Contracting Party of origin, that Contracting Party shall notify the Commission and any Contracting Party which may be affected by a transboundary impact on the Baltic Sea Area". Paragraph 2 of the same Article imposes the duty to enter into consultations upon the Parties concerned. Pursuant to paragraph 2, in the case of two or more Parties sharing transboundary waters within the catchment area of the Baltic Sea, they should cooperate to ensure that potential impacts on the marine environment of the Baltic Sea Area are fully investigated within the environmental impact assessment. Furthermore, the Parties concerned are also required jointly to take appropriate measures to prevent and eliminate pollution including cumulative deleterious effects.

264 Redgwell (n 263) 619-620. The author also added that EC Directive 85/337 on environmental assessment similarly applies to major projects with significant environmental effects, *ibid* 620, note 119.

265 Francioni (n 263) 64.

266 Redgwell (n 263) 633 (The author also argued that Article 8 of the Protocol follows the bifocal approach of leaving it open to contracting parties to exercise jurisdiction on a territorial and/or personal basis. This jurisdictional approach leaves open the potential for future jurisdictional disputes which are not covered by the mandatory dispute-settlement provisions of the Protocol", *ibid* 633-634).

In Article 4, paragraph 3(c) and (d), of the "Barcelona Convention" of 10/06/1995 duty is imposed upon Contracting Parties to undertake environmental impact assessment for proposed activities that are likely to cause a significant adverse impact on the marine environment and to promote cooperation between and among States in environmental impact assessment procedures related to activities under their jurisdiction or control which are likely to have a significant adverse impact on the marine environment of other States or areas beyond the limits of national jurisdiction. It is clear that the latter provision also indicates the general environmental law obligation of prevention of transboundary damage.

Pursuant to Article 17 (Environmental impact assessment) of the "Specially Protected Areas Protocol" of 10/06/1995, in the planning process leading to decisions on industrial and other projects and activities that could significantly affect protected areas and species and their habitats, the Parties are required to evaluate and take into consideration the possible direct or indirect, immediate or long-term, impact, including the cumulative impact of the projects and activities being contemplated.

With respect to the international jurisprudence, one may refer that in his Separate Opinion[267] appended to the "*Gabcikovo-Nagymaros*" Judgment of 25/09/1997, Judge Weeramantry referred to numerous both soft law and hard law instruments which indicate the principle of "environmental impact assessment". According to Judge Oda, in this case "the Parties are under an obligation in their mutual relations, under Articles 15, 16 and 19 of the 1977 Treaty, and, perhaps in relations with third parties, under an obligation in general law concerning environmental protection, to preserve the environment in the region of the river Danube. The Parties should continue the environmental assessment of the whole region and search out remedies of a technical nature that could prevent the environmental damage which might be caused by the new Project".[268]

Furthermore, the principle of environmental impact assessment has also been referred to by the European and the Inter-American Human Rights Courts (notably in recent cases) in environmental human rights cases.[269]

ii. The EIA principle in the EU law

Under the European Community law, the Directive 85/337 on "*Environmental impact assessment*"[270] might be cited as the pioneer legislation in this area. Article

267 "Separate Opinion of Vice-President Weeramantry" (n 233) 111-113.

268 "Dissenting Opinion of Judge Oda" appended to "*Gabcikovo-Nagymaros Project Case*", ICJ Judgment of 25/09/1997, ICJ Rep. 153, para 33.

269 For instance, see, *Giacomelli v. Italy* App. No.59909/00, (ECtHR, 02/11/2006), para 94; *Taşkın and Others v. Turkey* App. No.46117/99, (EctHR, Judgment of 10/11/2004), para 113; "*Case of the Saramaka People v. Surinam*", (I-ACtHR, Judgment of 28/11/2007) (*Preliminary Objections, Merits, Reparations and Costs*) para 129, Operative para 9.

270 The Council Directive 85/337/EEC of 27/06/1985 on the *"Assessment of the Effects of Certain Public and Private Projects*

3 of Directive 85/337 requires that an environmental impact assessment must be carried out for certain public or private projects.[271] At least as far as the projects listed in Annex I to the Directive are concerned, the obligation act is not subject to any preconditions. This Directive also provides that the public concerned is to be consulted when an impact study is carried out, (Article 6). Since the Directive does not contain any proviso, the public's involvement in such projects is therefore obligatory.[272] Consequently, in accordance with Directive 85/337 the authorities must conduct environmental impact assessment even if there is no national legislation in place. The public concerned has to be consulted in the consent procedure. The considerations submitted must be taken into account in the decision.[273]

Here it may be additionally noted that the Decision 13/18/II of the Governing Council of UNEP of 24/05/1985, entitled "*Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources*"[274], in (para.12) ("Environmental assessment") requires States to assess the potential effects/impacts, including possible transboundary effects/impacts, of proposed major projects under their jurisdiction or control, particularly in coastal areas, which may cause pollution from land-based sources, so that appropriate measures may be taken to prevent or mitigate such pollution.

Pursuant to Article 1, paragraph vi, of the "*Convention on Environmental Impact Assessment in a Transboundary Context*" (Espoo Convention)[275] of 25/02/1991, "environmental impact assessment" means a national procedure for evaluating the likely impact of a proposed activity on the environment. Parties to the Convention undertake to take and implement all necessary measures, including, with respect to proposed activities that are likely to cause *significant adverse transboundary impact*, the establishment of an environmental impact assessment procedure that permits public participation. They shall ensure that an environmental impact assessment is

on the Environment"; OJ L 175/40 (05/07/1985). The Directive 85/337 of 1985 was amended by Directive 97/11/EC; OJ L 73/5 (14/03/1997).

271 Sionaidh Douglas-Scott, 'Environmental Rights in the European Union-Participatory Democracy or Democratic Deficit?' in Boyle and Anderson (ed) *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press 1996) 109, 119-121. The author refers to the EC Directive 85/337, in which Article 3 requires an environmental impact assessment to be carried out for certain projects; Also see, Dupuy (n 249) 426.

272 Ludwig Kramer, 'The Implementation of Community Environmental Directives within Member States: Some Implications of the Direct Effect Doctrine' (1991) 3 (1) J. Envtl. L. 39, 47.

273 *Ibid* 49.

274 The "*Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources*", adopted by the Governing Council of UNEP Decision 13/18/II of 24/05/1985; available at, http://www.unep.org/law/PDF/UNEPEnv-LawGuide&PrincN07.pdf

275 The "*Convention on Environmental Impact Assessment in a Transboundary Context*" (Espoo Convention) was adopted on 25/02/1991 and entered into force on 10/09/1997; *reproduced in*, 30 ILM 800 (1991). Pursuant to Article 1/(viii) of the Convention "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party. For an analysis on the Espoo Convention, see, Laura Carlan Battle, 'A Transnational Perspective on Extending NEPA: The Convention on Environmental Impact Assessment in a Transboundary Context' (1995) 5 (1) Duke Envtl. L & Pol'y F. 1.

undertaken prior to a decision to authorize or undertake a proposed activity, (Article 2, paras.2 and 3). Environmental impact assessment shall, as a minimum requirement, be undertaken at the project level of the proposed activity, (Article 2, para.7).

Under the Espoo Convention the primary responsibility of each party is to prevent, reduce, or control significant adverse transboundary environmental impacts from proposed activities. It creates a positive obligation for the parties to prepare an environmental impact assessment on proposed projects that may have transboundary effects; but it does not directly empower a party to prevent another from constructing a disputed project. [276]

The Conference convened in Turin on 29/03/1996 to adopt by common accord the amendments to be made to the Treaty on the European Union, the Treaties establishing respectively the European Community, the European Coal and Steel Community and the European Atomic Energy Community and certain related Acts adopted a series of Declarations. Among these Declaration 12 reads as follows: "12. *Declaration on environmental impact assessments* - The Conference notes that the Commission undertakes to prepare environmental impact assessment studies when making proposals which may have significant environmental implications.[277]

In 2001, a long-waited Directive, the European Parliament and of the Council Directive 2001/42/EC of 27/06/2001[278] on the "*Assessment of the effects of certain plans and programmes on the environment*" was issued.[279] Preamble (para.4) states that "environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects". Pursuant to Article 1 of the Directive 2001/42, the objective of this Directive is "to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development…" In accordance with Article 2 (Definitions), while 'environmental assessment' means "the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9" (para. b); 'the public' means "one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups", (para. d). Carrying out the environmental assessment "during the preparation of a plan or programme and before its adoption or

276 Battle (n 275) 5-6.

277 The "*Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts*"; OJ C 340, (10/11/1997).

278 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the "*Assessment of the effects of certain plans and programmes on the environment*"; OJ L/197 (21/07/2001).

279 Also see, Joanne Scott, 'Law and Environmental Governance in the EU' (2002) 51 (4) ICLQ 996, 997-998.

submission to the legislative procedure" is one of the general obligations imposed on Member States, (Article 4, para.1).

Article 6, paragraph 2, of Directive 2001/42 provides that the public be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or program and the accompanying environmental report before the adoption of the plan or program or its submission to the legislative procedure. The Directive further provides for transboundary consultations, where a Member State considers that the implementation of a plan or program being prepared in relation to its territory is likely to have significant effects on the environment in another Member State, or where a Member State likely to be significantly affected so requests, (Article 7, paragraph 1). Pursuant to Article 9, paragraph 1, the public and any Member State consulted under article 7 are informed of the plan or program adopted, and that plan or program be made available to them, along with a summary of how environmental considerations have been integrated into them, and opinions expressed during consultations, and the reasons for choosing the plan or program as adopted, in the light of the other reasonable alternatives dealt with. The latter Article seems particularly significant not only because it imposes a duty upon the authorities to provide information, including disclosure of the counter arguments raised at the decision-taking process, and thus provides transparency to that process even after the decision has been taken, but also because it facilitates monitoring of the measures decided as provided by Article 10 of the Directive.

The "*Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*" was adopted on 21/05/2003.[280] Pursuant to Article 1 of the Protocol, the objective of this Protocol is to provide for a high level of protection of the environment, including health, by, *inter alia*, establishing clear, transparent and effective procedures for *strategic environmental assessment*; provision for public participation in strategic environmental assessment (Art.1/c), and integration by these means environmental, including health, concerns into measures and instruments designed to further sustainable development, (Art.1/e). Article 2, paragraph 6, of the Protocol defines "strategic environmental assessment" as "the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying-out of public participation and consultations, and taking into account of the environmental report and the results of the public participation and consultations in a plan or programme." Except the inclusion of an explicit phrase "including health", "strategic environmental assessment" defined in (Article 2/6) of the 2003 Protocol does not in fact make any significant contribution to the definition

280 The "*Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*" was adopted at Kiev on 21/05/2003 and entered into force on 11/07/2010; OJ, L 308/35–49, (19/11/2008).

of the term "environmental assessment" which was already provided in (Article 2/b) of the Directive 2001/42/EC of 27/06/2001.

6. Access to information and participation in decision-making process

i. Recognition and scope of the principles in soft and hard law instruments

Beginning from the 1980s there has been an increasing recognition of the right of the general public to receive information about the state of their environment and to participate in environmental decision-making, and of the duty of states and international organizations to provide this.[281] In the broad sense this development "can be represented as the application of arguments for democratic governance as a human right to environmental matters".[282] As Kiss and Trindade observed "sustained and strengthened democracy is a precondition for environmental and human rights protection and sustainable development. The latter is the result of the former… The right to democratic participation entails individual responsibility, it in fact engages the responsibility of everyone".[283] In line with this general trend the participation of non-governmental organizations (NGOs) has also been recognized and they have assumed an increasingly important role in the negotiation, ratification, implementation and enforcement of international environmental agreements.[284] The principle of information and consultation "usually manifests itself as an obligation whereby States must inform and consult one another, prior to engaging in any activity or initiative that is likely to cause transfrontier pollution, so that the country of origin of the potentially dangerous activity may take into consideration the interests of any potentially exposed country".[285]

The UN "World Charter for Nature" of 28/10/1982 states that "all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation", (para.23). Moreover, (para.16) of the 1974 Charter

281 Fayette (n 207) 263.

282 Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Boyle and Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press 1996) 43, 60.

283 Alexandre. Kiss and A. Cancado Trindade, 'Two Major Challenges of Our Time: Human Rights and the Environment' in A. A. C. Trindade (ed) *Human Rights, Sustainable Development and the Environment* (Costa Rica, Institute for Inter-American Human Rights 1992) 287, 290. Referring to this article Simpson and Jackson stated that "the right to a healthy environment is one that presupposes the existence of a certain level of democratic freedoms"; See, Tony Simpson and Vanessa Jackson, 'Human Rights and the Environment' (1997) 14 (4) Envtl. & Plan. L. J. 268, 274.

284 Weiss (n 56) 693-694; James Cameron and Ruth Mackenzie, 'Access to Environmental Justice and Procedural Rights in International Institutions' in Boyle and Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press 1996) 129, 133-146; Boyle (n 282) 62.

285 Dupuy (n 249) 425 (The author added that, from a more general point of view, the principle of information and consultation covers "additional duty to provide to these potentially exposed States all relevant and reasonably available information concerning transboundary natural resources and transfrontier environmental interference") *ibid*.

deals with disclosure of information in a timely manner on planning activities and assessment of the effects on nature in order to allow effective consultation and participation.[286]

In various provisions of the "Declaration on the Right to Development" of 04/12/1986 the element of *participation* has been specifically emphasized. For example, Article 1/1 highlights the right of individuals and peoples "to participate in, contribute to, and enjoy" development; Article 2/1 mentions the human person as an "active participant and beneficiary" of the right to development; Article 2/3 speaks of "active, free and meaningful participation in development"; Article 8/1 shows that "women have an active role in the development process" and Article 8/2 mentions the need for States to "encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights".[287]

Principle 10 of the "Rio Declaration" of 1992 provides that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, *each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities*, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." (Emphasis added). As Shelton observes, this provision "promotes clear obligations for states in regard to environmental rights".[288] According to Boyle "although the Rio Declaration contains no explicit human right to a decent environment, Principle 10 does give substantial support in mandatory language for participatory rights of a comprehensive kind".[289] Some authors argue that Principle 10 demonstrates a preference for the widespread sharing of environmental knowledge. "This principle establishes an informational right: the people have a 'right to know'. On environmental matters of consequence, every person is entitled to 'appropriate access' to information. This right by law is to be enforceable against public bodies that possess apposite information. Principle 10 imposes on states an affirmative duty to provide information, generate public awareness, and create open forums for debate and discussion".[290]

286 The 1982 Charter (para 16) reads: "All planning shall include… the formulation of strategies for the conservation of nature… and assessments of the effects on nature of proposed policies and activities" that "shall be disclosed to the public by appropriate means in time to permit effective consultation and participation".

287 Allan Rosas, 'The Right to Development' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights* (Kluwer 2001) 119, 127-128.

288 Dinah Shelton, 'What Happened in Rio to Human Rights?' (1992) 3 (1) Yearbook Int'l. Envtl. L. 75, 84.

289 Boyle (n 282) 60.

290 Batt & Short (n 55) 273-274 (The authors added that pursuant to Principle 10 the public has a right to know all information relevant to its fate. Public officials must release information about government operations, as well as crimes and torts committed against the people by business entities", *ibid* 276. However, they omit to comment on whether that Principle

This principle is also stated in Agenda 21 under Chapter 23.2 which reads as follows: "One of the fundamental prerequisites for the achievement of sustainable development is *broad public participation in decision-making*. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work".[291]

The ECHR and the I-ACHR consider the "right to access information" ("right to be informed") and the "right to participation of decision-making process" as some of the most fundamental aspects of environmental human rights cases. In some cases both the European and the Inter-American Courts explicitly refer to Principle 10 of the Rio Declaration.[292]

Furthermore, the "right to access information" has also been provided in a series of international legally binding instruments.

For instance, Article 6, paragraph a/(iii), of the United Nations "Framework Convention on Climate Change" of 09/05/1992 requires States, *inter alia*, to promote and facilitate "public participation in addressing climate change and its effects and developing adequate responses". Article 14, paragraph 1 (a), of the "Convention on Biological Diversity" of 05/06/1992 requires that Parties "where appropriate, allow for public participation" in procedures requiring environmental impact assessment. While Article 14, paragraph 1 (d), of the "Convention on Biological Diversity" imposes duty upon States to notify immediately the potentially affected States in the case of imminent or grave danger or damage, Article 17 requires the Parties to facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity.

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also imposes duty on States to make necessary arrangements for the provision of information on private individual sponsored projects having significant potential environmental impacts).

291 **Agenda 21**, Report of the UN Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol.III), 14/08/1992, Chapter 23.2; Also see, Chapters 27.9, 27.13 of the **Agenda 21**: ("27.13 Governments will need to promulgate or strengthen, subject to country-specific conditions, any legislative measures necessary to enable the establishment by non-governmental organizations of consultative groups, and to ensure the right of non-governmental organizations to protect the public interest through legal action") and Chapter 38.44 ("Procedures should be established for an expanded role for non-governmental organizations, including those related to major groups, with accreditation based on the procedures used in the Conference. Such organizations should have access to reports and other information produced by the United Nations system. The General Assembly, at an early stage, should examine ways of enhancing the involvement of non-governmental organizations within the United Nations system in relation to the follow-up process of the Conference"); For further discussions, see, Cameron and Mackenzie (n 284) 135-136.

292 For instance, see, *Taşkın and Others v. Turkey* (n 269) para 98-99; "*Case of Raxcaco-Reyes v. Guatemala*", (Inter-American Court, Judgment of 15/09/2005) (Merits, Reparations and Costs) para81.

Article 23, paragraph 2, of the "Cartagena Protocol on Biosafety"[293] of 29/01/2000 imposes a duty upon the Parties to consult the public in the decision-making process regarding living modified organisms and make the results of such decisions available to the public, subject to confidential information in accordance with Article 21. Pursuant to Article 23, paragraph 3, of the Protocol, each Party shall endeavor to inform its public about the means of public access to the Biosafety Clearing-House.

With regard to duty to inform the public one may also cite Article 9 of the "Industrial Accidents Convention" of 17/03/1992.[294]

The Council of Europe's "*Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*"[295] ("Lugano Convention"), which was opened for signature on 21/06/1993, indicates three different sources which may hold environmental information, and thus recognizes that persons concerned should be able to access such information. First, Article 14 (Access to information held by public authorities), paragraph 1, of the Convention provides that any person shall, at his request and without his having to prove an interest, have access to information relating to the environment held by public authorities. But the Convention in this context also sets out seven main circumstances in which the right of access may be restricted under internal law because it would affect particular types of confidentiality, public security, matters which are currently under investigation, confidentiality of personal data or the interests of the environment concerned (Article 14, para.2). Secondly, in addition to public authorities, the Convention takes account of the existence of many bodies involved in the field of environment. Thus, bodies which have public responsibilities for the environment and which are under the control of a public authority are subject to the same obligations as the public authorities themselves. Access to information

293 Article 23, paragraph 1, of "Cartagena Protocol on Biosafety" of 29/01/2000 reads as follows: "The Parties shall: (a) Promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking also into account risks to human health. In doing so, the Parties shall cooperate, as appropriate, with other States and international bodies; (b) Endeavour to ensure that public awareness and education encompass access to information on living modified organisms identified in accordance with this Protocol that may be imported".

294 Article 9 of the "Industrial Accidents Convention" of 17/03/1992 reads as follows: "Article 9 - Information to, and Participation of the Public - *1.* The Parties shall ensure that *adequate information is given to the public in the areas capable of being affected by an industrial accident arising out of a hazardous activity*. This information shall be transmitted through such channels as the Parties deem appropriate… *2.* The Party of origin shall, in accordance with the provisions of this Convention and whenever possible and appropriate, *give the public in the areas capable of being affected an opportunity to participate in relevant procedures with the aim of making known its views and concerns on prevention and preparedness measures*, and shall ensure that the opportunity given to the public of the affected Party is equivalent to that given to the public of the Party of origin." (Emphasis added). But note that in Article 22, paragraph 1, of this Convention a limitation on the supply of information is also recognized in order "to protect information related to personal data, industrial and commercial secrecy, including intellectual property, or national security".

295 The Council of Europe "*Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*" (ETS No.150), adopted by the Committee of Ministers on 08/03/1993 and opened for signature, in Lugano, on 21/06/1993, but not entered into force yet. Preambular (para.6) emphasizes the desirability of providing for strict liability in the field of nature conservation and the protection of environment taking into account the 'polluter pays' principle, and (para.8) refers to Principle 13 of the 1992 Rio Declaration. For relevant literature, for example see, Robin R. Churchill, 'Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects' (2001) 12 (1) Yearbook Int'l. Envtl. L. 3.

shall be given via the competent public administration or directly by the body itself, (Article 15). As a third category, the Convention under Article 16 recognizes access to specific information held by operators. A person who has suffered damage may at any moment, and especially before instituting legal proceedings, request information. This access to information is in fact aimed at giving the person concerned the opportunity to gather all the elements necessary for him to determine if he can take the case to court and to establish the existence of a claim for compensation under the Convention, (Article 16).[296]

Article 15, paragraph 1, of the "Barcelona Convention" of 10/06/1995 provides that "the Contracting Parties shall ensure that their competent authorities give to the public appropriate access to information on the environmental state in the field of application of the Convention and its Protocols, on activities or measures adversely affecting or likely to affect it and on activities carried out or measures taken in accordance with the Convention and the Protocols". Article 15, paragraph 2, of the Barcelona Convention requires the Parties to ensure that the opportunity is given to the public to participate in decision-making processes relevant to the field of application of the Convention and the Protocols, as appropriate. Note that the public's right of access to information provided in paragraph 1 of this Article is limited on the grounds of "confidentiality, public security or investigation proceedings", (Article 15, para.3).

Although the "*Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal*"[297] of 01/10/1996, Article 12 (Information to and Participation of the Public), paragraph 1, limits the application area with the exceptional cases in which transboundary movement of hazardous wastes is permitted under Article 6 of the Protocol, it requires Parties to ensure that adequate information is made available to the public, transmitted through such channels as they deem appropriate. In accordance with paragraph 2 of the same Article both the States of export and of import shall give the public an opportunity to participate in relevant procedures with the aim of making known its views and concerns.

Article 15 (Implementation of the Convention), paragraph 2, of the "*Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*"[298] of 10/09/1998 reads as follows:

296 Article 19, paragraph 2, of the 1993 Lugano Convention provides that "requests for access to specific information held by operators under Article 16, paragraphs 1 and 2 may only be submitted within a Party at the court of the place: (a) where the dangerous activity is conducted; or (b) where the operator who may be required to provide the information has his habitual residence".

297 The "*Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal*" done and opened for signature at Izmir on 01/10/1996.

298 The "*Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*" was adopted and opened for signature at a Conference of Plenipotentiaries in Rotterdam on

"Each Party shall ensure, to the extent practicable, that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III." Annex III of the Convention lists the "chemicals subject to the prior informed consent procedure". Article 15/2 of the Convention states that "despite its significance to the prior informed consent procedure and to safe chemicals management, the issue of safer alternatives to hazardous chemicals is barely mentioned in the Rotterdam Convention".[299]

Article 16, paragraph 1, of the UN/ECE "Convention on the Protection and Use of Transboundary Watercourses and International Lakes" of 17/03/1992 requires the Riparian Parties to ensure that information on conditions of transboundary waters, measures taken or planned to be taken to prevent, control and reduce transboundary impact, and the effectiveness of those measures be made available to the public.

Pursuant to Article 5, paragraph (i), of the "Protocol on Water and Health" of 17/06/1999, access to information and public participation in decision-making concerning water and health are needed, *inter alia*, in order to enhance the quality and the implementation of the decisions, to build public awareness of issues, to give the public the opportunity to express its concerns and to enable public authorities to take due account of such concerns. Such access and participation should be supplemented by appropriate access to judicial and administrative review of relevant decisions". Specific norm on "public information" appears in Article 10 of the Protocol. While paragraphs 1 to 3 of Article 10 indicate the duty of provision of information held by public authorities, paragraph 4 (a-c) lists three grounds for not making information available. Moreover, in Article 10, paragraph 5, of the Protocol an additional eight grounds are listed in order to empower the public authority to refrain from publishing information or from making information available to the public.[300]

10/09/1998 and entered into force on 24/02/2004; *reproduced in*, 38 ILM 1 (1999). In preambular paragraph 8 of this Convention it is recognized that "trade and environmental policies should be mutually supportive with a view to achieving sustainable development". Pursuant to Article 1, "the objective of this Convention is to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order *to protect human health and the environment from potential harm* and to contribute to their *environmentally sound use*, by facilitating *information exchange* about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties". (Emphasis added); For an analysis, see, Nancy S. Zahedi, 'Implementing the Rotterdam Convention: The Challenges of Transforming Aspirational Goals into Effective Controls on Hazardous Pesticide Exports to Developing Countries' (1999) 11 (3) Geo. Int'l Envtl. L. Rev 707; Also see, Paula Barrios, 'The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?' (2004) 16 (4) Geo. Int'l Envtl. L. Rev**.** 679 (This Convention provides for three types of procedures: (i) information exchange; (ii) export notification domestically banned or severely restricted chemicals not subject to prior informed consent, and (iii) prior informed consent for the chemicals listed in Annex III", *ibid* 725).

299 Barrios (n 298) 750.

300 Article 10, paragraph 5, of the "Protocol on Water and Health" of 17/06/1999 lists the following grounds for not disclosing information: If disclosure of the information would adversely affect: (a) The confidentiality of the proceedings of public authorities; (b) International relations, national defense or public security; (c) The course of justice; (d) The confidentiality of commercial or industrial information (with an exception that information on emissions and discharges which are relevant for the protection of the environment shall be disclosed); (e) Intellectual property rights; (f) The confidentiality of personal data and/or files relating to a natural person; (g) The interests of a third party; (h) The environment to which the information relates, such as the breeding sites of rare species.

In Article 8 of the "*Protocol on Strategic Environmental Assessment*" of 21/05/2003[301] to the 1991 Espoo Convention, specific duties are imposed upon parties to ensure early, timely and effective opportunities for public participation, including that of relevant non-governmental organizations, in the strategic environmental assessment of plans and programs, by using electronic media or other appropriate means, as well as providing opportunity to the public to express its opinion, and making necessary arrangements in order to inform and consult the public. Pursuant to Article 2, paragraph 8, of the Protocol, "the public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups. Furthermore, each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental, including health, protection in the context of this Protocol, (Article 3, para.3), and ensure that persons exercising their rights in conformity with this Protocol shall not be penalized, persecuted or harassed in any way for their involvement, (Article 3, para.6). Protection against discrimination on the use of Protocol rights is also significant, (Article 3, para.7).

The "*Protocol on PRTRs*" of 21/05/2003, was the first legally binding international instrument on pollutant release and transfer registers.[302] Pursuant to Article 1, "the objective of this Protocol is to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers (PRTRs) in accordance with the provisions of this Protocol which could facilitate public participation in environmental decision-making as well as contribute to the prevention and reduction of pollution of the environment". Article 11, paragraph 1, of this Protocol imposes a duty upon the Parties to ensure public access to information contained in its pollutant release and transfer register, without an interest having to be stated, primarily by providing for direct electronic access through public communications networks. Pursuant to paragraph 2 of the same Article, if there is difficulty for direct electronic access, each Party shall ensure that its competent authority upon request provides that information by any other effective means, at the latest within a month after the request has been submitted. But in Article 12, paragraph 1 (a) to (e), of the Protocol a considerably long list of grounds for keeping the information confidential is also provided. In case of refusal of the request for information, each Party undertakes to ensure that any person concerned has access to a review procedure before a court of law or another independent and impartial body, (Article 14, para.1). Public participation in the development of national pollutant release is recognized under Article 13 of the Protocol.

301 The "*Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*" was adopted at Kiev on 21/05/2003 and entered into force on 11/07/2010.

302 Pursuant to Article 2, paragraph 6, of the 2003 "Protocol on PRTRs" of 21/05/2003, "… 'Pollutant' means a substance or a group of substances that may be harmful to the environment or to human health on account of its properties and of its introduction into the environment."

While Article 10, paragraph 1(b), of the "*Stockholm Convention on Persistent Organic Pollutants*"[303] of 22/05/2001 provides that "each Party shall promote and facilitate provision to the public of all available information on persistent organic pollutants", paragraph 2 of the same Article requires each Party to ensure that "the public has access to the public information referred to in paragraph 1 and that the information is kept up-to-date". Consequently, as an additional element the provision of updated information was pointed out in this Convention.[304]

Pursuant to Article XVI (Procedural Rights) of the "*African Convention on the Conservation of Nature and Natural Resources (Revised Version)*"[305] of 11/07/2003 the Parties are required to adopt the legislative and regulatory measures necessary to ensure timely and appropriate (a) dissemination of environmental information; (b) access of the public to environmental information, and (c) participation of the public in decision- making with a potentially significant environmental impact.

On the other hand, various environmental protection conventions provide provisions to allow specialized inter-governmental bodies or agencies, as well as national and international non-governmental organizations (NGOs), to participate in the meetings of the Conference of Parties as observers.

For example, Article XI, paragraph 7, of the "*Convention on International Trade in Endangered Species*" (CITES) of 03/03/1973[306]; Article 11/5 of the "*Montreal Protocol on Substances that Deplete the Ozone Layer*" of 16/09/1987[307], and Article 23, paragraph 5, of the "*Convention on Biological Diversity*" of 05/06/1992. It is clear that such relatively liberalized procedures do not only provide transparency of the operation of the convention system, but also facilitate speedy and broader dissemination of information. The "*Convention on the Conservation of Antarctic*

303 The "*Stockholm Convention on Persistent Organic Pollutants*" adopted at Stockholm on 22/05/2001, opened to signature on 23/05/2001.

304 On the differences between the "Rotterdam Convention" of 10/09/1998 and the "Stockholm Convention" of 23/05/2001, see, Barrios (n 298) 755-756.

305 Gemalmaz, 'Introduction to International Environmental Law: Part II' (n 6) 780.

306 Article XI, paragraph 7, of the "*Convention on International Trade in Endangered Species*" of 03/03/1973 reads as follows: "7. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object: (a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and (b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located. Once admitted, these observers shall have the right to participate but not to vote"; For further information see, Gemalmaz, 'Introduction to International Environmental Law: Part II' (n 6) 789-790.

307 Article 11, paragraph 5, of the "Montreal Protocol on Substances that Deplete the Ozone Layer" reads as follows: "The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not party to this Protocol, may be represented at meetings of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to the protection of the ozone layer which has informed the secretariat of its wish to be represented at a meeting of the Parties as an observer may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Parties".

Marine Living Resources"[308] (CCAMLR) of 20/05/1980 is also significant as it encourages the Commission and the Scientific Committee to develop cooperative working relationships, not only with inter-governmental but also non-governmental organizations, (Article XXIII/3). Moreover, these two organs may also invite such organizations to send observers to their meetings, (Article XXIII/4). In accordance with the latter provision an umbrella environmental NGO incorporating a number of NGOs with Antarctic interests, namely, the ASOC, was granted observer status in 1988.[309] However, for instance, the "*Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*"[310] of 16/06/1994 does not provide procedures for participation of NGOs.

In this context the "*Convention concerning the Protection of the Alps*"[311] of 07/11/1991 is also noteworthy. Although the obligation concerning publication of information could be applied in accordance with national laws regarding confidentiality (Article 4/5), the Contracting Parties undertake to establish an appropriate program of public information on the results of research and observations as well as on measures taken, (Article 4/4). Furthermore, the Convention contains explicit provisions with respect to NGOs. For example, the Parties agree to collaborate with governmental and non-governmental international organizations for the efficacious application of the Convention, (Article 4/3). The Alpine Conference, which is the main organ established by the Convention, may admit observers from NGOs active in this field. Moreover, transfrontier associations of territorial collectives in the Alpine region may be represented at meetings of the Alpine Conference by observers, (Article 5/5).[312] In the "*Protocol for the Implementation of the 1991 Alpine Convention on Soil Protection*"[313] of 16/10/1998, Article 25 (Evaluation of the effectiveness of the provisions), paragraph 2, states that non-governmental organizations active in this field may be consulted. Pursuant to Article 19/2 of the 1998 Protocol the Parties undertake to ensure that the national results of research and systematic observation are integrated in a joint permanent observation and information system and that they are made accessible to the public under the existing institutional framework. Article

308 The "*Convention on the Conservation of Antarctic Marine Living Resources*" (CCAMLR) adopted at Canberra on 20/05/1980 and entered into force on 07/04/1982; *reproduced in*, 19 ILM 841 (1980).

309 Stuart B. Kaye, 'Legal Approaches to Polar Fisheries Regimes: A Comparative Analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention' (1995) 26 (1) Cal. W. Int'l L. J. 75, 87.

310 The "*Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*" was adopted at Washington D.C., on 16/06/1994 and entered into force on 08/12/1995; *reproduced in*, 23 ILM 67 (1995); in (1995) 10 Int'l J. Marine & Coastal L. 127; Further see, Kaye (n 309) 109; Gemalmaz, 'Introduction to International Environmental Law: Part 1' (n 6) 272.

311 The "*Convention concerning the Protection of the Alps*" was adopted at Salzburg on 07/11/1991 and entered into force on 06/03/1995.

312 For further information see, Gemalmaz, 'Introduction to International Environmental Law: Part II' (n 6) 795-797.

313 The "*Protocol for the Implementation of the 1991 Alpine Convention on Soil Protection*" was adopted at Bled on 16/10/1998 and entered into force 18/12/2002. English translation of the Soil Conservation Protocol is published in OJ of the European Union, 22/12/2005, L 337/29-35; For further information see, Gemalmaz, 'Introduction to International Environmental Law: Part 1I' (n 6) 798.

22 requires the Parties to promote, *inter alia*, the information of the public concerning objectives, measures and implementation of the Protocol.

In accordance with Article 13, paragraph 1, of the "*Framework Convention on the Protection and Sustainable Development of the Carpathians*"[314] of 22/05/2003, the Parties undertake to pursue policies aiming at improving access of the public to information on the protection and sustainable development of the Carpathians. Paragraph 2 of the same Article requires the Parties to pursue policies guaranteeing public participation in decision-making with respect to protection and sustainable development of the Carpathians. Furthermore, the Conference of the Parties, a main organ established by the Convention, is empowered, *inter alia*, to seek cooperation of competent bodies or agencies, whether national or international, governmental or non-governmental, as appropriate, while it makes decisions necessary to promote the effective implementation of the Convention, (Article 15/2, i). Moreover, the Parties may decide to admit observers at the sessions of the Conference, including the observers, among others, from any national, intergovernmental or non-governmental organization, the activities of which are related to the Convention. In that connection, such observers admitted may present any information or report relevant to the objectives of the Convention, (Article 15/5).[315]

Apart from environmental instruments, it may be added that the provisions on access to information have been incorporated into different subject-matter conventions. In this context one may refer to, for instance, Articles 10 and 13 of the "*United Nations Convention against Corruption*" of 31/10/2003.[316]

314 The "*Framework Convention on the Protection and Sustainable Development of the Carpathians*" was adopted on 22/05/2003 and entered into force on 04/01/2006.

315 For further information see, Gemalmaz, 'Introduction to International Environmental Law: Part II' (n 6) 799-801.

316 The UN "*Convention against Corruption*" was adopted by the UN General Assembly Resolution 58/4 of 31/10/2003 and entered into force on 14/12/2005. "*Article 10 – Public Reporting* – Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: *(a)* Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; *(b)* Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and *(c)* Publishing information, which may include periodic reports on the risks of corruption in its public administration"; Further see, "*Article 13 – Participation of Society - 1.* Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: *(a)* Enhancing the transparency of and promoting the contribution of the public to decision-making processes; *(b)* Ensuring that the public has effective access to information; *(c)* Undertaking public information activities that contribute to nontolerance of corruption, as well as public education programmes, including school and university curricula; *(d)* Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary: (i) For respect of the rights or reputations of others; (ii) For the protection of national security or *ordre public* or of public health or morals. *2.* Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with

ii. The OSPAR Convention

a) The OSPAR Convention of 22/09/1992

The "OSPAR Convention" of 22/09/1992 provides for a right of access to information. Article 9 (Access to information), paragraph 1, of the OSPAR Convention provides that "the Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months." Article 9, paragraph 2, of the Convention is as follows: "The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention." But it must be noted that in paragraph 3 of the same Article a series of grounds are listed, *inter alia*, "commercial and industrial confidentiality, including intellectual property…", in order to reserve the right of Contracting Parties to refuse to provide for a request for such information.[317]

For the main part, the content of Article 9 of the OSPAR Convention, including exceptions provided in paragraph 3 of the same Article, appears to be taken from Directive 90/313/EEC.[318] As one commentator observed, "effectively, this means that access will depend on national policy and the political culture with respect to disclosure of information held by the authorities".[319]

b) The OSPAR Arbitral Tribunal of 03/07/2003 in the Mox Plant case

Concerning the application of Article 9 of the OSPAR Convention one may refer to the arbitration tribunal award issued on 03/07/2003 in the "*Mox Plant* (*Ireland v. United Kingdom*)" case.[320] The tribunal concluded by a two to one majority that the information requested by Ireland did not fall within Article 9 of the OSPAR

this Convention".

317 For the exceptions for the release of information under Article 9, para.3, of the "OSPAR Convention" of 1992, cf Article.4, paras 3-4, of the "Aarhus Convention" of 1998, which is examined below.

318 Hey - IJIsra – Nollkaemper (n 207) 47 (The authors added that "in view of the role of NGOs as watchdogs over the implementation of the Convention this may become an important provision") *ibid*.

319 Fayette (n 207) 264.

320 "*Mox Plant* (*Ireland v. United Kingdom*)", Arbitral Tribunal Award of 03/07/2003; available at <http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf>; reproduced in, 42 ILM 1187 (2003); Analysis of the case, see, Fitzmaurice (n 43) 544-558; Ted L. McDorman, 'Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)' (2004) 98 (2) AJIL 330; Yuval Shany, 'The First Mox Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures' (2004) 17 (4) Leiden JIL 815; Volker Röben, 'The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity?' (2004) 73 Nordic J. Int'l L. 223, 233-235.

Convention and that the United Kingdom was not in breach of that Article.[321]

Regarding the background to the case, on 30/07/1999, Ireland requested the full copy of the PA Consulting Group Report (PA was hired by British Fuels plc (BNFL) to carry out the detailed assessment; the public version of the PA Report of 27/12/1997 was redacted on the grounds of 'commercial confidentiality' under the UK Environmental Information regulations of 1992) on the basis of Directive 80/836 of the Euiratom and the EC Directive 90/313/EEC "Freedom of access to environmental information". The request was refused by the Department for the Environment, Transport and the Regions on the grounds of not prejudicing commercial interests of the enterprise by disclosing commercially confidential information. On 22/05/1991 Ireland again requested full information. In Spring 2001, BNFL prepared a new confidential document setting out the economic justification for the Mox plant, and, further, it appointed the consulting firm Arthur D. Little ("ADL"), to analyze the business case and to report on the resp onses to the public consultation exercise on it. On 31/10/2001, a decision was adopted approving the manufacture of the Mox at Sellafield. Greenpeace challenged the decision but failed.[322]

Ireland's application to the ITLOS for provisional measures against commissioning of the plant also failed. Indeed, on 09/11/2001, Ireland separately instituted proceedings against the UK under UNCLOS of 1982 and requested provisional measures, the case which is also cited as "*Mox Plant* (*Ireland v. UK*)". The case before the ITLOS is examined in this study below. Consequently, these two proceedings should be distinguished.

On 14/06/2001 Ireland, invoking Article 32 of the OSPAR Convention, requested the establishment of an arbitral tribunal to determine whether the UK's refusal to publish in full two reports concerning the economic justification for the Mox plant was consistent with its obligations under Article 9 of the Convention.

The Ospar Arbitral Tribunal Award of 2003 was the first award rendered under the arbitration clause of the OSPAR Convention. Ireland argued that the UK's provision of two reports on the economic justification of the Mox plant was only partly compatible with the obligation that emanates from Article 9 of the OSPAR Convention since it prevents a proper review of the issue, (Award, para.42).[323] It is significant to note that, in addition to the OSPAR Convention, with regard to "applicable international regulations" as provided for in Article 9(2) of the OSPAR Convention, Ireland also relied on the Rio Declaration of 1992 and on the Aarhus Convention of 1998.

The UK argued that the tribunal was without jurisdiction, that Ireland's claims were inadmissible, that Article 9(1) of the OSPAR Convention did not create a direct right

321 "*Mox Plant*" (n 320) para 185.

322 Fitzmaurice (n 43) 544-546.

323 In its final submission, Ireland requested the Tribunal to order and declare: (i) that the UK had breached its obligations under Article 9 of the OSPAR Convention by refusing to make available information deleted from the PA Report and ADL Report as requested by Ireland; (ii) that, as a consequence of the aforesaid breach of the OSPAR Convention, the UK should provide Ireland with a complete copy of both the PA and the ADL Report, alternatively a copy of the PA Report and the ADL Report ,which included all such information upon the release of which the arbitration tribunal would decide if commercial confidentiality within the meaning of Article 9(3) of the OSPAR Convention would be affected; and (iii) that the UK pay Ireland's costs of the proceedings, "*Mox Plant*" (n 320) para 42.

for any person or State to receive information, that the information requested did not fall within Article 9(2) of the Convention, and that, even if none of those grounds were considered valid by the tribunal, Ireland's request for information could be refused on the basis of commercial confidentiality, (paras.43, 44, 78).[324]

The majority of the arbitrators (Lord Mutsill, who was nominated by the United Kingdom, and M. Reisman, who was jointly nominated by the other two arbitrators) construed Article 9 of the OSPAR Convention obligation narrowly and refused Ireland's request to receive information on the economic viability of the Mox plant. According to the majority of arbitral tribunal the information sought by Ireland could not be viewed as information whose disclosure was mandated by the OSPAR Convention, because the redacted parts dealt with business information and not with environmental information on the state of the maritime area. Furthermore, it was not shown that the requested information pertained to activities which were likely adversely to affect the maritime area, (Award, paras.170-175, 179).

In view of the majority, Article 9(2) of the OSPAR Convention provides for a limited right of access to environmental information. Moreover, Ireland failed to prove that the operation of the Mox plant would, in all likelihood, be harmful to the environment. In his dissent Mr. Griffith (nominated by Ireland) argued that the text of Article 9(2) of the Convention should be broadly construed, so as to cover an economic cost-benefit analysis of the activities at the Mox plant. He also argued that application of the precautionary principle should have put the burden of proof as to the likelihood of harm as a result of the operation of the Mox plant on the UK. Consequently, he was of the view that the requirements of Article 9(2) of the OSPAR Convention had been met and that the tribunal should have examined whether the UK could have invoked any of the grounds for non-disclosure listed in Article 9(3) of the Convention.

Furthermore, the Tribunal held that the only applicable law was the OSPAR Convention itself. Consequently, it dismissed the Irish contention that other treaties needed to be taken into account in assessing the UK's actions (Award, paras.80-86). The Tribunal also did not accept the Irish argument that, even without an explicit consent of the parties to the dispute, the Tribunal was required to consider customary law and evolving international law and practice in interpreting the OSPAR Convention, (paras.98-104). The Tribunal found that in this case it had not been authorized to apply "evolving international law and practice", thus it could not do so, (paras.100-101).[325]

324 In its final submission, the UK requested the Tribunal: (i) to adjudge and declare that it lacked jurisdiction over the claims brought against the UK by Ireland and/or that those were inadmissible; (ii) to dismiss the claims brought against the UK by Ireland; (iii) to reject Ireland's request that the UK pay Ireland's costs, and instead to order Ireland to pay the UK's costs, *ibid* para 44.

325 However, in his Dissenting Opinion Dr. Griffith argued, *ibid*, that the OSPAR Convention was *lex specialis* as between the Parties and was to be interpreted within the general context of other relevant rules and principles of international law. As to the Aarhus Convention, since it had come into force, it was not correct to describe it as *lege ferende*. Moreover, the UK signed this Convention; consequently, it is bound by Article 18 of the Vienna Convention on the Law of Treaties which imposes an obligation to refrain from acts that would defeat its object and purpose. In order to support the latter argument he referred to the ICJ's "(*Qatar v. Bahrain*)" Judgment of 16/03/2001, in which the ICJ accepted the principle that treaties that have not been ratified treaties may possess an evidentiary value that helps to establish the view and intentions of signatories. Fitzmaurice (n 43) 555.

Further see, "*Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*)" Judgment of 16/03/2001, [2001] ICJ Rep 40 (In this case Qatar argued that "Great Britain has always recognized Qatar's title to Zubarah. Thus it maintains that, even though it was not ratified, the Anglo-Ottoman Convention of 29 July 1913 accurately reflected the common view of the Ottoman Imperial Government and the British Government 'as to the territorial situation at the

> The majority members of the arbitral tribunal also accepted the approach that the OSPAR Convention contained a "self-contained dispute resolution mechanism". The tribunal made a textual analysis of Article 9(1) of the Convention (Award, para.139) and compared the text of that provision with EC Directive 90/313 of 07/06/1990. The tribunal took the view that each text of the EC Directive and the OSPAR Convention created independent legal obligations and remedies, (paras.141-142). According to the Tribunal, while a breach of the EC Directive could be pursued only within a domestic legal system, Article 32 of the Convention did not exempt Article 9(1) from international litigation, and there was nothing in the Convention indicating that a breach of Article 9(1) gave arise only a municipal remedy, (para.143). With respect to the international law of state responsibility, the Tribunal stated that international legal responsibility could arise in case competent national authorities act in a way inconsistent with international legal obligations (paras.144-146).
>
> In view of the Tribunal, other rules of international law on the right of access to environmental information could only be considered in the context of the interpretation of the OSPAR Convention in accordance with Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties.

Shany commented that this award is problematic from an environmentalist perspective. "The approach taken by the majority is hardly consistent with the trend of expanding the right of access to environmental information found in modern international law and European law instruments. It is also hard to reconcile the award with the precautionary principle (Rio Declaration, Principle 15; OSPAR Convention, Art.2/2, a), as application of this principle should arguably have shifted the burden of proof to the party engaged in the contested marine-related activity (the author also referred to Griffith's Dissention Opinion (para.92), who suggested that application of the precautionary principle should have lowered the threshold of evidence needed to demonstrate environmental harm)…" [326]

According to McDorman, this OSPAR arbitration case either did not seem to reach the correct conclusion or other results were not able to be reached. "Rather, what should be inferred is that in international environmental litigation, hard law and international legal obligations matter more than environmental aspirations and atmospherics". The author argues that one may note the "apparent narrowness of the law applied and the strictness of the textual interpretation. It is likely that few will defend the decision".[327]

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time and the status of the Al-Thani Rulers as having governed in the past and as still governing, the entire Peninsula'...", *ibid* 66, para 80. The Court found that both Parties agreed that the 1913 Anglo-Ottoman Convention was never ratified; they differed on the other hand as to its value as evidence of Qatar's sovereignty over the peninsula, *ibid* 68, para88. The Court observed that "*signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature*. In the circumstances of this case the Court came to the conclusion that the Anglo-Ottoman *Convention did represent evidence* of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani Ruler in Qatar up to 1913", *ibid* 68, para 89). (Emphasis added).

326 Shany (n 320) 821.

327 McDorman (n 320) 338. But as another way of looking at the case, the author added that one may ask whether the OSPAR arbitration will encourage or discourage international third-party arbitral settlement of international environmental

In the view of M. Fitzmaurice, the most interesting part of the Award concerns the applicable law that was taken into consideration in rendering the Award. The Tribunal relied on Article 31 of the 1969 Vienna Convention on Treaties. "The approach adopted by the Tribunal was restrictive, it took into consideration only the law in force between the parties. Although possibly conservative, a cautious assessment of applicable law is very much a feature of the decision-making of international courts and tribunals."[328]

iii. The Aarhus Convention of 25/06/1998

For the application of Principle 10 of the "Rio Declaration", the UN Economic Commission for Europe adopted the "*Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*" ("Aarhus Convention")[329] on 25/06/1998. The Aarhus Convention is based on three pillars: (1) access to environmental information, (2) public participation in environmental decision-making, and (3) the establishment of judicial and administrative mechanisms to redress environmental grievances.[330]

Article 1 of the "Aarhus Convention" states that "in order to contribute to the protection of the right of every person of present and future generations to live in an

disputes. According to him a better perspective is that most states will be heartened by the OSPAR arbitration. "The tribunal resolved the issue before it in accordance with the constitutive instrument, which is precisely what international third-party arbitration is supposed to accomplish. Moreover, by maintaining a litigational approach to international environmental law, the tribunal's award will encourage states to make greater use of international arbitration in the future, for the award emphasizes the predictable rather than opening up new, and inherently unpredictable, territory", *ibid* 338-339.

328 Fitzmaurice (n 43) 556-557 (The author added that "the evidentiary value of Article 18 of the Vienna Convention is rather unclear. It is an intermediary measure not to defeat the object and purpose of a treaty during the grey period between its signing and its entry into force. The signing of a treaty does not impose on a state any obligation to ratify. It is a very weak obligation that does not even oblige states to follow the treaty provisions during the interim period. Evidentiary value of public statements made by a state after signing a treaty but before ratification (which may never follow), is also controversial. For example, in the *North Sea Continental Shelf* cases, both the Netherlands and Denmark contended that the Federal Republic of Germany, by conduct and by public statements and proclamations, unilaterally assumed the obligations of the 1958 Convention on the Continental Shelf; or had manifested its acceptance of the conventional regime. The ICJ rejected these contentions" *ibid* 557).

329 The "*Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*" ("Aarhus Convention") (ECE/CEP/43) was adopted on 25/06/1998 and entered into force on 30/10/2001; *reproduced in*, 38 ILM 15 (1999).

330 Philippe Sands (n 108) 858-859; Stephen Tromans, *Nuclear Law* (2nd Edition, Hart Publishing 2010) 154-155; Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 1 YBIEL 51; Sean T. McAllister, 'The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (1998) 10 Colo. J. Int'l Envtl. L. & Pol'y 187, 189; Maria Lee and Carolyn Abbot, 'The Usual Suspect? Public Participation Under the Aarhus Convention' (2003) 66 (1) Modern L. Rev. 80; Veit Koester, 'Review of Compliance under the Aarhus Convention, a Rather Unique Compliance Mechanism' (2005) 2 (1) JEEPL 31; Fiona Marshall, 'Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee 2004-2006' (2006) (8) 1 Int'l Comm. L. Rev. 123, 125-126; Carine Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a 'Pillar' of Empowerment' (2008) 10 (1) Envtl. L. Rev. 28; Jerzy Jendroska, 'Public participation in the preparation of plans and programmes: some reflections on the scope of obligations under Article 7 of the Aarhus Convention' (2009) 6 (4) JEEPL 495; Jonas Ebbesson, '*Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention*' (2011) 4 (2) Erasmus L. Rev. 71 (Discussion on the Aarhus Convention see, *ibid* 74-78); Marianne Dellinger, '*Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law*' (2012) 23 (2) Colo. J. Int'l Envtl. L. & Pol'y 309; Elana Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as 'Soft' Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 (1) Neth. Int. L. Rev. 27.

environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."[331] In addition to Article 1 of the Convention, several paragraphs of the preamble contain some human rights elements.[332] Furthermore, Article 3, paragraph 9, of the Convention reads as follows: "Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities."

The provisions of "Article 4 – Access to environmental information", "Article 5 – Collection and dissemination of environmental information", "Article 6 – Public participation in decisions on specific activities", "Article 7 – Public participation concerning plans, programmes and policies relating to the environment"[333], "Article 8 – Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments", and "Article 9 – Access to justice" may be of particular note here.

Under the Aarhus Convention, requests for environmental information can be refused if the public authority does not hold the requested information; if the request is manifestly unreasonable or formulated in too general a manner, or if the request concerns materials in the course of completion or concerns international communications of public authorities, (Article 4, para.3, a-c). Furthermore, the release of information is not required if it would have an adverse effect on (1) the confidentiality of the public proceedings, (2) international relations, (3) national defense, (4) public security, (5) the fair administration of justice, (6) intellectual property rights, or (7) confidential commercial information, (Article 4, para.4).[334] Although the provision in Article 4, para.4 that these exceptions should be narrowly construed amounts to a positive norm in drawing a framework for the exceptions, some of these grounds for refusal may nevertheless be considered as "vague"[335] and open to abuse of exception clause, notwithstanding a counter-balance provision in Article 5 of the Convention for the issuance of periodic reports by the public authorities

331 With regard to the phrase "present and future generations" in Article 1 of the Convention it is commented that "arguably the Convention also extends participation rights and equal treatment temporally to future generations. On the basis of Article 1, which guarantees in theory the procedural rights of present generations, not only is the substantive right of future generations to live in a healthy environment protected but also the rights of participation in decision-making, which are a precondition for the enjoyment of the former"; See, Nadal (n 330) 32.

332 Ebbesson (n 330) 74.

333 Jendroska (n 330) 496, 515 (The author argues that neither the scope of application of Article 7 nor the obligation as to the required framework of public participation are clearly determined).

334 Cf., Article 9, para 3, of the "OSPAR Convention" examined above.

335 Cf., McAllister, (n 330) 192.

on proposed and existing activities that may significantly affect the environment. Similarly, with regard to public participation in environmental decision-making, in Article 6, para.11, of the Convention it is stated that "Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment". The phrase "to the extent feasible and appropriate" in this paragraph seems to have the potential to devaluate a strict compliance duty upon the Contracting Parties by providing an excessive flexibility or a wide margin of appreciation to the public authorities concerned.

As regards to access to justice, Article 9, para.1, of the Aarhus Convention indicates that when a request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that Article, the person concerned has been provided access to a review procedure before a court of law or another independent and impartial body established by law.[336] This norm has two aspects; on the one hand, it imposes a duty upon the Parties to provide access to justice, and on the other hand, it recognizes an individual right for such access. The importance of Article 9 also emanates from the provision in paragraph 3 of the same Article in which members of the public are allowed access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene national environmental laws.

Furthermore, pursuant to Article 9, para.4, of the Aarhus Convention, the procedures provided in paragraphs 1 to 3 of the same Article shall "provide adequate and effective remedies, including *injunctive relief* as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible". (Emphasis added). In so far as it relates to the subject-matter of the present study, attention may be drawn also to the phrase "including injunctive relief" which appeared in Article 9, para.4, of the Convention, without ignoring the question regarding what such injunctive relief would be. Although Article 9/4 of the Convention is cited in many studies, the part of the provision concerning "injunctive relief" seems not to have received enough attraction, possibly because of the difficulty of suggesting such injunction or a general suggestion that this may be a dead letter. However, national judicial organs in particular, and especially administrative courts, have power to order injunction relief if the requested party can satisfy the court for such a measure.

Pursuant to Article 15 of the Aarhus Convention, a Meeting of the Parties was required to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this

336 But note that Article 9, para 2, of the "Aarhus Convention" provides two requirements, i.e. "a sufficient interest" and "impairment of a right", which, in the view of the present author, has weakened the effect of the right to access to justice.

Convention. In its first meeting held in October 2002, by a Decision 1/7 the Meeting of the Parties established the Aarhus Convention Compliance Committee, and Annex to Decision 1/7 sets out the structure and functions of the Compliance Committee and the procedures for the review of compliance. The Committee's main functions include considering submissions by Parties, referral by the secretariat, and communications from the public, (Annex to Decision 1/7, para.13). The most significant aspect of the compliance mechanism[337] is the possibility for members of the public to make a communication to the Committee concerning a Party's compliance.[338] The regime that applies to a communication from the public is quite similar to the individual application procedure provided under international human rights convention systems, including the requirement of exhaustion of available domestic remedies as well as its exceptions, (Annex to Decision 1/7, paras.20-21). However, the compliance procedure is not a redress procedure for violations of individual rights. The Committee may only make recommendations to the Party concerned on specific measures to address the matter raised by the public, (Annex to Decision 1/7, para.36/b, iii). The Committee, even in a recommendatory form, has not been empowered to indicate interim measures of any kind.

Notwithstanding the normative shortcomings of the Aarhus Convention, this instrument is extremely important in environmental policy-making.[339] One of the indicators of this significance may also be derived from the environmental human rights cases under the ECHR or I-ACHR. In such cases both the European and the Inter-American Courts of Human Rights explicitly refer to the Aarhus Convention.[340] Furthermore, some important steps have been taken within the European Community environmental law for the implementation of the Aarhus Convention.[341]

iv. Access to environmental information within the EU Directives

On 07/05/1990 the Council of the European Communities adopted Regulation 1210/90 establishing the European Environment Agency (EEA) together with an environmental information network.[342] The objective of Regulation 1210/90 was to establish the EEA and to coordinate the Community of the environmental information

337 Koester (n 330) 31-32; Further see, Ebbesson (n 330) 75-76; Fasoli & McGlone (n 330) (The authors conclude that the Aarhus Convention Compliance Committee has become an enforcement mechanism capable of generating decisions with legal effect, rather than a "soft remedy").

338 Marshall (n 330) 127-132.

339 Jendroska (n 330) 500-501 (According to the author the Convention provides "a framework in which members of the public have more power where they have particularized interests with respect to matters which directly affect their lives and well-being, and progressively less direct power and influence as matters become more abstract and general").

340 For example, see, "*Taşkın and Others v. Turkey*" (n 269) para 99; *Vasile Gheorghe Tatar and Paul Tatar v. Romania* App. No.67021/01, (ECtHR, Decision Admissible 05/07/2007) para43; Also see, under the I-ACHR system, "*Case of Raxcaco-Reyes v. Guatemala*", Inter-American Court of Human Rights, Judgment of 15/09/2005 (Merits, Reparations and Costs), par.81.

341 Aine Ryall, 'Implementation of the Aarhus Convention through Community Environmental Law' (2004) 6 (4) Envtl. L. Rev. 274.

342 The Council Regulation 1210/90 of 7 May 1990 on the "*Establishment of the European Environment Agency and the European Environment Information and Observation Network*"; OJ, L 1210/1 (1990).

network (Article 1). The EEA was empowered to gather, process and analyze data on the environment, (Article 2). Pursuant to Article 3 the EEA furnishes information which might be directly used in the implementation of the environmental policy of the Community. The same Article also provides a list of priority areas on which the EEA must focus its information collection activities.[343]

The Council of the European Communities (EC) adopted Directive 90/313/EEC on the "*Freedom of Access to Information on the Environment*"[344] on 07/06/1990. It became applicable after 01/01/1993. In Article 2 of this Directive 90/313/EEC the term "information relating to the environment" was defined as any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities, including those which give rise to nuisance such as noise, or measures adversely affecting, or likely so to affect, these, and on activities or measures designed to protect these, including administrative measures and environmental management programs. According to Article 1 of the same Directive the purpose is to ensure freedom of access to and dissemination of information on the environment held by public authorities. Pursuant to Article 3/1, public authorities are required to make available information relating to the environment to any person upon request without the requirement of proving a legal interest or explanation. But such a request for information may be dismissed on the ground of confidentiality (Articles 3/2 and 3/3). Such information may be made available to either natural or legal persons (Article 3). The term "legal persons" includes associations involving environmental matters with the condition that such entities must be considered legal persons under their domestic law. The rejection of the request for information may be subjected to a judicial or administrative review (Article 4). This obligation is primarily imposed on public authorities (Article 2/b), but pursuant to Article 6 the mentioned obligation may extend to cover private undertakings charged with statutory duties to provide public services and goods.[345] (*Cf.*, Article 9 of the OSPAR Convention of 1992 and Article 9 of the Aarus Convention). Since the right to appeal is granted in Article 4 of Directive 90/313, it does not require a right of appeal under national law. In order to implement the Directive, Member States must enact necessary laws and regulations. It may be added that it is an established case-law that a Directive confers directly enforceable rights if the provisions are sufficiently clear, precise, and unconditional in that it leaves no discretion to Member States concerning its implementation.[346] But the provisions of

343 Dietrich Gorny, 'The European Environment Agency and the Freedom of Environmental Information Directive: Potential Cornerstones of EC Environmental Law' (1991) 14 B. C. Int'l & Comp. L. Rev. 279, 283-294.

344 Directive 90/313/EEC of 07/06/1990 on the "*Freedom of Access to Information on the Environment*"; OJ, L 158/56, (23/06/1990).

345 Stefan Weber, 'Environmental Information and the European Convention on Human Rights' (1991) 12 (5) HRLJ 177, 183; Also see, Gorny (n 343) 294-299; Douglas-Scott (n 271) (As the author noted, Article 6 of the European Council Directive 85/337 provides that any demand for authorization of a public or private project which could have an effect on the environment should be made public and that member States shall ensure that the public have an opportunity to express an opinion before the project is initiated, *ibid* 120-121).

346 Kramer (n 270) 41-42 (The author argues that for the "direct effect" of individual provisions of Community law the

Directive 90/313 suggest that they only partially fulfill the requirements for direct effect since the content of Directive 90/313 seems conditional due to the fact that Member States are required to provide implementing regulations.[347]

Article 15 of Council Directive 96/61/EC "*concerning integrated pollution prevention and control*" of 24/09/1996[348] regulates access to information and public participation in the permit procedure without prejudice to the Council Directive 90/313/EEC of 07/06/1990. Furthermore, Article 16 of Directive 96/61/EC requires Member States to exchange information and to report to the Commission on the implementation of this Directive and its effectiveness.

Article 255, paragraph 1, of the Treaty of Amsterdam[349] of 02/10/1997 provided that "Any Union citizen and any natural or legal person residing or having a registered office in a member state, shall have a right of access to European Parliament, Council and Commission documents". Pursuant to this Article the Regulation 1049/2001/EC on *Public access to European Parliament, Council and Commission documents* was adopted on 30/05/2001 and entered into force on 03/12/2001.[350]

The Directive 2003/4/EC of the European Parliament and of the Council on *Public Access to Environmental Information* was adopted on 28/01/2003.[351] This new Directive updates the previous Directive 90/313/EEC of 1990.

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directive's provisions must be precise and unconditional. In deciding whether a provision in a directive is sufficiently precise or clear, consideration has to be given to whether it formulates a sufficiently clear position, i.e., makes conditions and consequences of the facts of the matter clear. In order to have a direct effect, a Community provision must also be unconditional. It must not require additional rulings or measures to be adopted by the Member States in its field of application in order to be effective. The author on pp.42-48 provides a long list of examples of Community environmental directives on various areas with direct effect. The author concluded that "provisions of Community environment directives that are precise and unconditional have direct effect. They are valid in the legal system of Member States even if the Member States have not, or not correctly, incorporated the Community provisions in national law. All state agencies have to respect provisions of directly applicable Community environment legislation. If necessary, they must set aside and not apply incompatible national law", *ibid* 55-56).

347 Gorny (n 343) 298.

348 The Council Directive 96/61/EC "*concerning integrated pollution prevention and control*" of 24/09/1996; reproduced in (1997) 9 (1) J. Envtl. L. 206-218 (For the purposes of this Directive 'pollution' means the direct or indirect introduction as a result of human activity, of substances, vibrations, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment (Article 2, paragraph 2).

349 The "Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts" was signed on 02/10/1997 and entered into force on 01/05/1999; OJ, C 340, (10/11/1997). Article 255, paragraph 2, of the Treaty provided that a new legally binding regime on access to documents should be in place by May 2001.

350 Regulation 1049/2001/EC of the European Parliament and of the Council of 30/05/2001 regarding "*Public access to European Parliament, Council and Commission documents*"; OJ, L 145/43, (31/05/2001). It draws a general legal framework for the public's access to documents of the EC institutions and bodies. In accordance with Article 2, paragraph 3, and Article 3, paragraph (a), of the 2001 Regulation, it is applicable to "all documents held by an Institution", i.e., the European Parliament, Council and Commission.

351 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on "*Public Access to Environmental Information and Repealing Directive 90/313/EEC*"; OJ L 041/26, (14/02/2003); Also see, the Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 "*Providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC*"; OJ L 156/17 (25/06/2003). Directive 2003/35/EC amended a number of existing environmental directives with a view to strengthening participation rights and improving access to justice. The Council Directive 96/61/EC "*concerning integrated pollution prevention and control*" of 24/09/1996, reproduced in (1997) 9 (1) J. Envtl. L. 206-218; Also see, Tromans (n 330) 430-432.

On 17/02/2005, the EC acceded to the Aarhus Convention.[352] Almost all Member States of the EC had already been become a party of that Convention. After the EC's accession to the Aarhus Convention, a new legislation on the right of access to environmental information applicable to the Community's institutions and bodies, namely Regulation 1367/2006 of 06/09/2006 on the *Application of the Aarhus Convention to Community Institutions and Bodies* was issued.[353] It entered into force on 28/06/2007. Different from the general Regulation 1049/2001/EC of 30/05/2001, the Regulation 1367/2006 of 06/09/2006 specifically applies to access to environmental information. The 2006 Regulation uses the term "information", which is "documents" in the 2001 Regulation. Furthermore, the new Regulation of 2006 also extends the scope of the right to access to environmental information by placing all institutions and bodies of the EC under the obligation to provide such information, (Articles 2/c and 3).

With regard to exceptions to the general rule of access to documents, while the 2001 Regulation is strict both in terms and application, the 2006 Regulation concerning access to environmental information provides some changes on this issue. As one commentator observed, "first, it adds a discretionary exception ('may refuse') 'where disclosure of the information would adversely affect the protection of the environment to which the information relates' in its Article 6 (2). Second, its Article 6 (1) adds an 'exception to the exception' of Article 4 (2), 1st and 3rd indents (except investigations), of the Transparency Regulation (of 2001) by stating that in the case of emissions into the environment a public interest in disclosure will always be deemed to exist. Furthermore, the Aarhus Regulation (of 2006), in its Article 6 (2), in fine stresses that all the exceptions of the Transparency Regulation are to be interpreted restrictively, taking into account the public interest in disclosure and adds that consideration should be given to whether the information sought relates to information on emissions".[354]

It is generally argued that the most difficult parts of implementing the Aarhus Convention, both on the Community level as well as on the Member States level, are the obligations resulting from Article 9 of the Convention, which are subsumed under the term 'access to justice'. This notion may result in different violations, such as the impairment of the right of access to information (Art.9/1), the impairment of the

352 *Council Decision 2005/370/EC of 17/02/2005* on the conclusion, on behalf of the European Community, of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; OJ L 124/1, (17/05/2005).

353 Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the *Application to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies*; OJ L 264/13, (25/09/2006).

354 Sofia de Abreu Ferreira, 'The Fundamental Right of Access to Environmental Information in the EC: A Critical Analysis of WWF-EPO v. Council' (2007) 19 (3) J. Envtl. L. 399, 405; For the legal background of access to justice on environmental matters in the EU Member States and in particular the practice and outcome of the NGOs participation in the period between 1996 and 2001, see, Miriam Dross, 'Access to Justice in Environmental Matters' (2003) 11 (4) Tilburg Foreign L. Rev. 720, 724-736.

right to public participation (Art.9/2) and access to justice where acts and omissions of public authorities or of private persons breach law relating to the environment (Art.9/3).[355]

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RESEARCH ARTICLE

Syrians under Temporary Protection and Their Acquision of Turkish Citizenship

Zeynep Derya Tarman*

Abstract

This paper describes possible ways of acquiring Turkish citizenship in relation to those Syrians in Turkey who are under temporary protection status. The paper initially provides an overview of the types of international protection statuses under Turkish law following which temporary protection status is examined. Next, the Turkish Citizenship Act is analyzed through the status of Syrians in Turkey. In this regard, initially, the acquisition of Turkish citizenship through kinship and general neutralization are explained, following which exceptional ways of acquisition is elaborated upon. Then, acquiring Turkish citizenship through marriage is explained which is followed by the final section on acquisition of Turkish citizenship through adoption. In providing such explanations, Council of State decisions that reflect the discretionary powers of the administrative authorities as well as the interpretations under the doctrine are taken into account. While certain particularities and restrictions under the relevant laws exist and the discretionary powers of the administrative authorities as well as Turkish public policy concerns may cause obstacles, the Turkish Citizenship Act provides possible legal grounds for the naturalization of Syrians under temporary protection in Turkey.

Keywords

Temporary Protection, Syrians, Citizenship, Refugees, Acquisition of Turkish Citizenship

***Corresponding Author:** Zeynep Derya Tarman (Prof.), Koç University, Faculty of Law, Department of Private International Law, Istanbul, Turkiye. E-mail: ztarman@ku.edu.tr ORCID: 0000-0002-2574-8643

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I. Introduction

The Syrian civil conflict of 2011 is one of the major humanitarian crises that continues to affect the whole world and in particular Turkey. Turkey has applied an open-door policy for Syrians and assisted those who sought asylum in masses. However, due to the deterioration of the situation in Syria and the unresolved internal problems, the situation has taken an unpredictable turn and Turkey has now become the country hosting the largest number of refugees. Turkey has been affected by this process in all economic, legal and political fields. Turkey has granted "temporary protection" status to these asylum seekers arriving at the Turkish border in masses. According to the official data published, as of 2.2.2023, in Turkey there are 3,500,964 Syrians under "temporary protection".[1] The issue of citizenship applications of Syrians under the "temporary protection" status, who have been residing in Turkey for many years, has come to the Turkish political agenda.

The issue of the acquisition of Turkish citizenship of persons under temporary protection status in Turkey is becoming more and more controversial with each passing day. The fact that the temporary protection status provides a unique protection, distinct from the other international protection statuses, is the most significant factor causing these debates. With this study, it is aimed to discuss this controversial issue in detail and to make a general evaluation in the light of the legal regulations and the opinions put forward in the doctrine.

Firstly, the international protection statuses regulated under Law No. 6458 on Foreigners and International Protection (LFIP)[2] will be briefly mentioned. Afterwards, the difference between temporary protection status and international protection statuses will be explained and its main features will be specified. Following this information on international protection and temporary protection statuses, the conditions for persons under temporary protection status to apply for citizenship will be examined in detail within the scope of the acquisition of citizenship under Turkish Citizenship Law No. 5901 (TCC)[3].

II. International Protection and Temporary Protection

A. International Protection Status

Before addressing the issue of citizenship under Turkish law, it is important to determine the status of Syrian migrants within the international protection status under Turkish law. The international protection status under Turkish law is regulated

1 For statistics shared on the website of the Turkish Ministry of Internal Affairs, Directorate of Migration Management, see: https://www.goc.gov.tr/gecici-koruma5638 (Last Accessed: 21 February 2023).

2 Official Gazette no. 11.04.2013/28615.

3 Official Gazette no. 12.06.2009/27256.

under the Law on Foreigners and International Protection (from herein "LFIP") which was published in the Official Gazette on April 11, 2013. The purpose of the law is defined in Article 1 of the LFIP. According to this Article, the purpose of the law is to regulate the procedures and principles regarding the entry of foreigners into Turkey, their stay in Turkey and their departure from Turkey, as well as the scope and implementation of the protection to be provided to foreigners who request Turkey's protection. The provisions of this law emerged in the process of harmonization with the European Union and are in accordance with human rights standards. The LFIP constitutes a legal basis for the concept of temporary protection to be granted in cases of mass influx and hence is important in terms of the law to be applied to Syrians who have temporary protection status in Turkey. Furthermore, the LFIP established the "Directorate of Migration Management" under the Ministry of Interior Affairs to carry out the work and operations in the field of migration and international protection.

According to Article 3/1, paragraph (r) of the LFIP, there are three categories of international protection status under Turkish law: refugee, conditional refugee and subsidiary protection. International protection is an umbrella term for these three types. Moreover, the concept of "migrant" refers to all foreigners in a country in the sense of international law. The definition of "foreigner" is set out in the definitions section of Article 3 of the Turkish Citizenship Law. According to this Article, a foreigner is *"a person who has no citizenship ties with the Republic of Turkey"*. There are different types of international protection statuses and each of these statuses grant different rights to the foreigners.

1. Refugee

The Convention Relating to the Status of Refugees dated 1951 (hereinafter, "The 1951 Convention"), which Turkey has ratified[4], includes a definition of refugee in Article 1 and this definition has been taken into account in enacting Turkish domestic laws on international protection. Before moving on to the examination of the definition of a "refugee" under both international and Turkish laws, it is significant to understand the historical background of the emergence of international refugee protection and the 1951 Convention.

The first quarter of the 20th century, where the effects of wars were prominently felt, there were many instances of the mass movement of persons due to compelling reasons[5]. The primary foundations of rules of international protection were introduced

4 Official Gazette no. 05.09.1961/ 10898.

5 Neva Övünç Öztürk, *Mültecinin Hukuki Statüsünün Belirlenmesi*, (Seçkin Yayıncılık, 2015) 74; Hatice Selin Pürselim, "Temel Kavramlar Işığında Mülteci Hukukunun Gelişimi", Uluslararası İlişkilerde Göç, Şirin Öner, Aslı/ Ihlamur, Öner/ Suna, Gülfer (Editor), (Der Yayınları 2018) 209.

at these times through the League of Nations, (and more specifically though the establishment of the "International Refugee Organisation" within that) in pursuant to finding a solution to the mass migration problem after the collapse of the Ottoman Empire and as a result of the Russian Revolution[6]. With the establishment of the United Nations in 1945, the former "International Refugee Organization" was dissolved and replaced by the United Nations High Commissioner for Refugees (UNHCR) in 1950[7]. The mandate of the UNCHR is "to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide[8]". In this background, the 1951 Convention was drafted in order to set forth international rules for refugee protection. The 1951 Convention is also described as the output of the Cold War era[9].

According to this provision: *"It shall apply to every person who, as a result of events occurring before 1 January 1951 and having 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, having no 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 definition of refugee in the Convention was intended to provide protection to those who had to leave their country for the reasons listed after World War II. However, in 1967, the United Nations signed the New York Protocol in order to make the definition more comprehensive[10] in terms of its temporal and territorial application. In the Protocol, the definition of refugee was reintroduced, and its scope was expanded. While the 1951 Geneva Convention required an element of time and geographical limitation for the definition of a refugee, the New York Protocol abolished this time limitation and left the geographical limitation to the discretion of the contracting states. Currently, there are only four states in the world

6 Öztürk (n 5) 74; Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83(843) *The International Review of Red Cross*, 727, 728-729.

7 On the mandate and short history of UNCHR see: <https://www.refworld.org/publisher,UNHCR,COUNTRYPOS,,,0.html> last accessed 11.04.2023.

8 Ibid, see also "Mandate of the High Commissioner for Refugees and his Office Executive Summary" at: <https://www.unhcr.org/5a1b53607.pdf> last accessed 11.04.2023.

9 Guy Goodwin-Gill, "The International Law of Refugee Protection", in *The Oxford Handbook of Refugee and Forced Migration Studies* (eds. Fiddian-Qasmiyeh, E., et. al), Oxford 2014, 44; Pürselim (n 5) 218-219.

10 Despite the attempt to make the refugee definition under the 1951 Convention more comprehensive though the said Additional Protocol, as of today the definition of "refugees" under the 1951 Convention is being criticised as not being inclusive enough to provide the sufficient international protection in accordance with international human rights laws especially in light of the challenges brought by the changing ecological circumstances (which for instance gave rise to the concept of "climate refugees"); on this discussion see: Jenny Han and Amanda Kuras (2019) 1(1) 'Climate Change and International Law: A Case for Expanding the Definition of "Refugees" to Accommodate Climate Migrants' *Fordham Undergraduate Law Review* 50; Abby Kleinman 'The Definition of a Refugee Under International Law: The Complexities Behind the Initial Deliberations and Modern Implications for Contemporary Refugees' (2022) (Winter Issue Online Edition Volume 11) *The Yale Review of International Studies* <http://yris.yira.org/essays/5622> accessed 10.04.2023; Hatice Selin Pürselim, "Mültecilerin Hukuki Statüsüne İlişkin Cenevre Sözleşmesi'ne Yönelik İki Tartışma: Sözleşme'nin Kapsadığı Kişiler ve Geri Göndermeme İlkesinin Bağlayıcılığı", Prof. Dr. Necla Giritlioğlu'na Armağan, Erman Hasan/Öğüz Tufan/Şıpka Şükran/İnal Emrehan/Baysal Başak (Editors), (On İki Levha Yayıncılık 2020) 523-527.

that are parties to the Geneva Convention or its Additional Protocol that preserve the geographical limitation in the definition of refugee: Turkey, Madagascar, Monaco and Congo.

Based on the 1951 Geneva Convention and the 1967 New York Protocol, Turkey has included the definition of a refugee in Article 61 of the LFIP. According to this definition: *"A foreigner who, as a result of events occurring in European countries, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, or a stateless person who, as a result of such events, is outside the country of his former habitual residence and is unable or, owing to such fear, unwilling to return to it, is granted refugee status after the status determination procedures".*

Pursuant to Article 61 of the LFIP, only those foreigners unable or, unwilling to avail themselves of the protection of their country *"due to events occurring in European countries"* are called refugees. What stands for a "European country" within the meaning of this provision is defined in the definitions section of Article 3 of the LFIP. According to this Article, *"Countries that are members of the Council of Europe and other countries to be determined by the President..."* will be considered a European country. In this case, to recognize a country as a "European" country in addition to being a member of the Council of Europe the decision of the President of the Republic plays an important role. Syria is not a member of the Council of Europe and has not been recognized as a European country by a Presidential decree. In this case, it is not possible to grant refugee status to people migrating from Syria under Turkish law.

2. Conditional Refugee

Article 62 of the LFIP includes the definition of a "conditional refugee." According to this Article, *"A foreigner who, as a result of events occurring outside European countries, is outside his/her country of nationality and is unable or, owing to such fear, unwilling to avail himself/herself of the protection of that country because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, or a stateless person who, as a result of such events, is outside his/her country of former habitual residence and is unable or, owing to such fear, unwilling to return to it, is granted conditional refugee status after the status determination procedures. The conditional refugee is allowed to stay in Turkey until he/she is resettled in a third country".* What distinguishes Article 62 of the LFIP from Article 61 is the absence of a geographical condition. In this case,

conditional refugee status will not be granted to those who are outside of Europe or seek asylum for reasons other than the five criteria listed in Article 61 of the LFIP. It is also important to note that this definition of "conditional refugee" under Article 61 of the LFIP was first described under Article 3 of the "Regulation on the Procedures and Principles to be Applied to the Individual Foreigners Seeking Asylum in Turkey or Requesting a Residence Permit from Turkey to Take Asylum in Another Country, Foreigners Arriving at Our Border for Collective Asylum and Possible Population Movements[11]" (the so-called "1994 Regulation") which was the regulation under Turkish law prior that envisaged the rules for the international protection of asylum seekers prior to the enactment of the LFIP. Under the 1994 Regulation the status for such persons was defined as "asylum seeker".

3. Subsidiary Protection

Although the refugee and conditional refugee statuses were created based on the Geneva Convention of 1951 under the LFIP, for those asylum seekers that fall outside of the conditions under the said statuses, "subsidiary protection" status was introduced. Subsidiary protection status is regulated under Article 63 of the LFIP. According to the provision, *"a foreigner or a stateless person, who neither could be qualified as a refugee nor as a conditional refugee, shall nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of [former] habitual residence would: a) be sentenced to death or face the execution of the death penalty; b) face torture or inhuman or degrading treatment or punishment; c) face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict; and therefore is unable or for the reason of such threat is unwilling, to avail himself or herself of the protection of his country of origin or country of [former] habitual residence."*

The subsidiary protection status regulated in Article 63 of the LFIP is a protection status granted individually in accordance with the "prohibition of refoulement" in international law. It provides a more inclusive protection than other international protection statuses by not requiring the five grounds set out in Articles 61 and 62 of the LFIP.[12] It is applied without geographical limitation to persons who do not fall under the definition of conditional refugee or refugee and who need international protection status for the reasons listed in the said article. This status is generated for the protection of the right to life and the prohibition of torture.[13] In this context, it complements other international protection statuses and is also referred to as

11 Official Gazette no. 30.11.1994/22127.

12 Aysel Çelikel, Günseli Öztekin Gelgel, *Yabancılar Hukuku* (26th edn, Beta Publishing 2021) 25; Öztürk (n 5) 403.

13 Çelikel, Öztekin Gelgel (n 12) 25; Gökçe Arıkan, *Göç Hukukunda Yabancıya Sağlanan Uluslararası, Bölgesel ve Ulusal Koruma* (On İki Levha Publishing 2020) 37.

"complementary" or "secondary" protection".[14] Since Syrian migrants are not at the risk of persecution under Article 63 of the LFIP, they cannot benefit from subsidiary protection status. Finally, of the said three international protection statuses will be applied to the asylum seekers on an individual basis. Therefore, it is not possible to apply such statuses to Syrian asylum seekers who migrated in mass influxes.[15]

B. Temporary Protection Status

Temporary protection is a tool to provide fundamental rights to asylum seekers in mass influx situations where the individual refugee determination process is set forth under the 1951 Convention. Historically, this status emerged from European states' inability to grant refugee status to individual asylum seekers because of the mass migration during the Bosnia and Kosovo crisis in the 1990s[16]. Refugee status cannot provide immediate and temporary protection to asylum-seekers who migrate in flows since in order to benefit from this status under the 1951 Convention, the status of each asylum seeker must be determined individually through interviews. On the other hand, when faced with a mass influx due to the obligations arising from international law, states cannot return asylum seekers to places where there is a risk of mistreatment. This is known as the "principle of non-refoulement"[17]. In line with this principle, states provide protection to asylum seekers fleeing in mass influxes and provide some minimum services on the basis of human rights.

The temporary protection regime, which emerged from the need to provide short-term and interim protection to asylum-seekers who migrated to Turkey in mass influx due to the open-door policy implemented after the civil war in Syria, has found its legal basis in Turkish law under Article 91 of LFIP[18]. This regime was applied for

14 Bülent Çiçekli, *6458 Sayılı Kanunla Güncellenmiş Yabancılar ve Mülteci Hukuku* (6th edn, Seçkin Publishing 2016), 301; Nuray Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku* (5th edn, Beta Publishing 2018), 51; Neşe Baran Çelik, 'Türk Hukukunda Uluslararası Koruma Başvurusunda Bulunan veya Uluslararası Korumadan Yararlanan Yabancıların Hak ve Yükümlülükleri' (2015) 1 İnönü Üniversitesi Hukuk Fakültesi Dergisi 78; Ahmet Hamdi Topal, 'Geçici Koruma Yönetmeliği ve Türkiye'deki Suriyelilerin Hukuki Statüsü' (2015) 2(1) İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 13; Süleyman Dost, "Ulusal ve Uluslararası Mevzuat Çerçevesinde Ülkemizdeki Suriye'li Sığınmacıların Hukuki Durumu" (2014) 4(1) Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi 49; B. Bahadır Erdem, 'Geçici Koruma Statüsündeki Suriyelilerin Sosyal, Siyasi ve Vatandaşlık Hukuku Bakımından Türkiye'deki Durumları' (2017) 37(2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 454; Arıkan (n 13) 40; Kutluhan Bozkurt, *Güncel Gelişmelerle Göç Hukuku* (2nd edn, Legal Publishing 2022) 63, 72; Işıl Özkan, *Göç ve Vatandaşlık Hukuku* (Seçkin Publishing 2022) 245.

15 Çelikel, Öztekin Gelgel (n 12) 25; Öztürk (n 5) 403.

16 Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' The American Journal of International Law (2000) 94(2), 279, 279-280.

17 For further information on the principle of non-refoulement and its connection to temporary protection see: Jane Jean-François/MCADAM, "Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies" (2004) 16(1) *International Journal of Refugee Law, 4-24*; Pürselim (n 9) 528-535.

18 For further information on temporary protection regime under Turkish law see: Meltem Ece Oba, 'Türk Hukukunda Geçici Koruma Rejimi' (PhD thesis, Koç University 2018); Doğa Elçin, "Türkiye'de Bulunan Suriyelilere Uygulanan Geçici Koruma Statüsü 2001/55 Sayılı Avrupa Konseyi Yönergesi İle Geçici Koruma Yönetmeliği Arasındaki Benzerlik ve Farklılıklar" (2016) 124 Türkiye Barolar Birliği Dergisi 9; Sema Çörtoğlu Koca, Candan Kavşat, "Geçici Koruma Yönetmeliği Uyarınca Geçici Koruma Kararının Kapsamı, Alınması ve Sona Ermesi" (2015) 1(1) Başkent Üniversitesi Hukuk Fakültesi Dergisi 329; Dost (n 14) 27; for a more international review of temporary protection regimes see: Meltem

the first time to the Syrian mass asylum-seekers. The procedures and principles regarding this temporary protection regime under Turkish law are regulated by the Temporary Protection Regulation and the Regulation on Work Permits of Foreigners under Temporary Protection and circulars of the Ministry of Interior. Temporary protection status is defined by the Directorate General of Migration Management as "*the protection provided to foreigners who have been forced to leave their country, who cannot return to the country they left, who come to or cross our borders in masses in search of immediate and temporary protection, and for whom individual international protection status determination process cannot be pursued*". Similarly, in the European Union, with Article 2 of the Temporary Protection Directive[19] , a separate status that provides immediate and temporary protection of an exceptional character for displaced persons arriving in a sudden and large mass influx was adopted in 2001. This was introduced as a separate status from refugee status as defined in the 1951 Convention relating to the Legal Status of Refugees to fill the protection gap in the 1951 Convention in the context of mass influxes.[20]

Temporary protection is not an international protection status.[21] It is a type of protection subject to domestic law that is introduced to provide emergency and precautionary protection to persons who arrive in large masses and cannot be assessed individually.[22] In order to be granted temporary protection status, it is necessary to migrate in a mass influx. In this case, the meaning of "mass migration" is defined under Article 3, paragraph 1, subparagraph (j) of the Temporary Protection Regulation. According to this Article, "mass migration" refers to *"situations where migration from the same country or geographical region takes place in a short period of time and in high numbers, and where individual international protection status determination procedures are not procedurally feasible due to the numbers in question".* In these cases, whether or not migrants will be granted temporary protection status will be determined by the decision of the State authorities.

İneli-Ciğer, *Temporary Protection in Law and Practice* (Brill 2018).

19 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212, 07/08/2001, bkz. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0055 (Last Accessed: 14.02.2023). For similarities and differences between the European Directive and the Turkish Regulation see Elçin (n 18) 10-77.

20 Aydoğan Asar, *Yabancılar Hukuku (Temel Konular)* (7th edn, Seçkin Publishing 2021) 294; Esra Yılmaz Eren, *Mülteci Hukukunda Geçici Koruma* (2nd edn, Seçkin Publishing 2021) 66, 67; Gökçe Konyalı, *Uluslararası Hukukta Sığınma Hakkı* (Seçkin Publishing 2021) 135; Koca, Kavşat (n 18) 331; Elçin (n 18) 23.

21 Çelikel, Öztekin Gelgel (n 12) 26; Çiçekli (n 14) 306; Bülent Çiçekli, *Uluslararası Hukukta Mülteciler ve Sığınmacılar* (Seçkin Publishing 2009) 118; Asar (n 20) 251; Ayşe Yasemin Aydoğmuş, 'Türk Hukukunda Geçici Korumadan Yararlananların Sınır Dışı Edilmesi' (2017) 37(2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 143; Neva Övünç Öztürk, 'Geçici Korumanın Uluslararası Koruma Rejimine Uyumu Üzerine Bir İnceleme' (2017) 66 (1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 242; Sibel Özel, 'Türkiye'deki Suriyelilerin Hukuki Statüsü' (2020) 17(2) Yeditepe Üniversitesi Hukuk Fakültesi Dergisi 722. In the doctrine, there are also those who specify temporary protection as an international protection status, see: Ekşi (n 14), 53, 54 and 151, 152; Nuray Ekşi, 'Türkiye'de Bulunan Suriyelilerin Hukukî Statüsü' (2012) 10 (119) Legal Hukuk Dergisi 4; İbrahim Kaya, Esra Yılmaz Eren, *Türkiye'deki Suriyelilerin Hukuki Durumu, Arada Kalanların Hakları ve Yükümlülükleri* (SETA Publishing 2015) 25.

22 Çelikel, Öztekin Gelgel (n 12) 168; Vahit Doğan, *Türk Yabancılar Hukuku* (6th edn, Savaş Publishing 2021) 12; Özel (n 21) 722; Koca, Kavşat (n 18) 341.

Pursuant to Provisional Article 1 of the Temporary Protection Regulation[23], this status is granted to persons who have arrived in Turkey *"since 28.04.2011 due to the events that took place in the Syrian Arab Republic".*

The services to be provided to those under temporary protection in Turkey are regulated under the Temporary Protection Regulation. Chapter 6 of the Regulation bears the subtitle "Services to be provided to Temporary Protected Persons". The Regulation uses the term "services" instead of "rights". This means that there is no element of obligation. Two examples of these services are health and education. Health services to be provided to temporary protected persons are regulated under Article 27 of the Temporary Protection Regulation. Pursuant to Article 27/f.1 subparagraph (a) of the Temporary Protection Regulation, temporary health centers have been established in temporary accommodation centers for the purpose of providing health services, the working procedures and principles of which are determined by the Ministry of Health. In the first period when the civil unrest in Syria began to emerge, the Temporary Protection Regulation was not yet in force, and the first official document prepared by the Ministry of National Education (MoNE) in the context of education, was the circular titled "Measures for the Syrian Citizens hosted outside the camps in our country", which was published on April 26 2013. It is stated that the MoNE will be responsible for providing education services. The aim was to ensure that children do not stay away from school and do not have their education interrupted.

Pursuant to Article 9 of the Temporary Protection Regulation, a temporary protection decision is issued by the President of the Republic upon the proposal of the Ministry. In this protection decision, the President of the Republic is authorized to determine who will be covered by this status, the starting date and, if necessary, the duration of this protection and the conditions for its termination.

Pursuant to Article 11 of the same Regulation, the President of the Republic may terminate this status upon the Ministry's proposal to terminate temporary protection. Upon the termination of this status, the President of the Republic may decide to allow the persons subject to this status to return to their country, to grant the status for which they meet the conditions collectively or to evaluate individual applicants for international protection, or to allow those under temporary protection to continue to stay in the country under conditions to be determined under the law.

In the event that persons with temporary protection status voluntarily leave Turkey, benefit from the protection of another country, die, exit to another third country for humanitarian reasons or resettlement, obtain one of the other types of legal stay specified in the law or acquire Turkish citizenship, their temporary protection ends in accordance with Article 12 of the relevant regulation.

23 Official Gazette no. 22.10.2014/29153.

The Governorate and the Directorate General are authorized to revoke the status of the person if it is later understood that the person should be excluded from the scope of temporary protection due to a serious conviction that the person is guilty of the acts specified in paragraph (F) of Article 1 of the Convention on the Legal Status of Refugees. The Governorate may also revoke the status of those who fail to fulfill the notification obligation three times in a row without an excuse.

In these cases, foreigners whose temporary protection status has expired and who are nevertheless in the country without any other legal basis become "illegal" migrants.

Syrians under temporary protection should be evaluated separately from those with international protection status in terms of the rights they have and their subsequent transition to Turkish citizenship. In the third part of this paper, the conditions under which Syrians, who are the subjects of this status, can acquire Turkish citizenship will be examined.

III. Acquisition of Turkish Citizenship by Syrians under Temporary Protection Status

The acquisition of Turkish citizenship is regulated under the "Turkish Citizenship Law". The acquisition of citizenship for those under temporary protection status will also be subject to the provisions of this law. In order to evaluate the applications of temporarily protected Syrians for Turkish citizenship, the acquisition of Turkish citizenship regulated in the TCC should be examined in detail.

A. Acquisition of Turkish Citizenship by Syrians under Temporary Protection Status on the Basis of Place of Birth

Pursuant to Article 5 of the TCC*, "Turkish citizenship is acquired either by birth or after birth"*. Pursuant to Article 6 of the TCC, *"Turkish citizenship by birth can be acquired by place of birth and/or descent. Citizenship by birth is acquired at the time of birth."* For the purposes of this paper, acquisition of citizenship on the basis of descent is not evaluated.

Pursuant to Article 8 of the TCC, in order to acquire Turkish citizenship on the basis of place of birth, the person must be born in Turkey and not be able to acquire any other citizenship by birth through his/her parents. It is understood that the legislature, in line with the international conventions to which Turkey is a party, aims not to eliminate the risk of leaving any person "stateless". In this context, children born in Turkey to stateless parents, for instance those who have lost their Syrian Arab Republic citizenship for a reason, may be granted citizenship based on place of birth within the scope of Article 8 of the TCC.[24]

24 Nuray Ekşi, 'Suriyelilere Toplu Olarak Türk Vatandaşlığı Verilebilir mi?' (2015) 89(2) İstanbul Barosu Dergisi, 198-199;

B. Acquisition of Turkish Citizenship by Syrians under Temporary Protection Status with the Decision of the Competent Authority

According to Article 9 of the TCC, "*Turkish citizenship shall be acquired after birth with a decision of the competent authority or by adoption or by choice*". Adoption is one of the cases of acquisition of citizenship after birth, which is subject to the discretion of the competent authority.[25] Hence, adoption is not in itself a separate category but should be considered a type of acquisition with the decision of a competent authority. Therefore, despite the wording under Article 9 of the TCC, the acquisition of Turkish citizenship can be possible in two ways: either by the decision of the competent authority or by the exercise of the right to choose.[26] In terms of the subject of this paper, the acquisition of Turkish citizenship by the decision of the competent authority is evaluated under four headings in detail below.

1. Evaluation of Persons under Temporary Protection Status in terms of the General Conditions for Acquisition of Turkish Citizenship

The first issue to be addressed regarding the acquisition of Turkish citizenship by the decision of the competent authority is the general naturalization. Article 11 of the TCC lists the conditions that a foreigner who wishes to acquire Turkish citizenship in a general way must meet. According to the Article, the conditions sought are as follows:

a) To be of age of consent possessing the power of discernment according to his/her national law or Turkish law if he/she is stateless,

b) To reside in Turkey for an uninterrupted period of five years prior to the date of application,

c) Have the intention of settling in Turkey and confirm by their behavior that they have decided to settle in Turkey,

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Kaya, Yılmaz Eren (n 21) 64; Mesut Aygün, Cansu Kaya, 'Yabancılar ve Uluslararası Koruma Hukukunda Kalıcı Bir Çözüm Olarak Yerel Entegrasyon' (2016) 7(1) İnönü Üniversitesi Hukuk Fakültesi Dergisi 132.

25 Ergin Nomer, *Türk Vatandaşlık Hukuku* (28th edn, Filiz Publishing 2021) 109; B. Bahadır Erdem, *Türk Vatandaşlık Hukuku* (8th edn, Beta Publishing 2020) 184, 185; Bilgin Tiryakioğlu, "Yeni Türk Vatandaşlığı Kanununun Eleştirel Analizi", Vatandaşlık, Göç, Mülteci ve Yabancılar Hukukundaki Güncel Gelişmeler, Türkiye Barolar Birliği Uluslararası Sempozyum, Ankara, 2010, 45; Gülin Güngör, *Tâbiiyet Hukuku* (9th edn, Yetkin Publishing 2021) 82; Musa Aygül, 'Evlât Edinme Yolu ile Vatandaşlığın Kaybedilmesi ve Kazanılması' (2012) 99 Türkiye Barolar Birliği Dergisi 68-69; Rona Aybay, Nimet Özbek, Gizem Ersen Perçin, *Vatandaşlık Hukuku* (Siyasal Publishing 2019) 145-146. Under the doctrine, certain authors consider the acquisition of Turkish citizenship through adoption as a separate way from acquisition by the decision of the competent authority, for further information see: Rifat Erten, '5901 Sayılı Türk Vatandaşlığı Kanununa Göre Türk Vatandaşlığının Kazanılması' (Turhan Publishing 2010), 953. In addition, under the doctrine, one view considers the acquisition of Turkish citizenship through adoption as a separate way from acquisition by the decision of the competent authority, nevertheless states that "…the legal nature of the acquisition of citizenship through adoption is closer to the acquisition of citizenship by the decision of the competent authority…", see: Turgut Turhan, Feriha Bilge Tanribilir, *Vatandaşlık Hukuku* (4th edn, Yetkin Publishing 2017) 108; Vahit Doğan, *Türk Vatandaşlık Hukuku* (18th edn, Savaş Publishing 2021) 58.

26 Doğan (n 25) 55.

ç) Not having a disease that poses a danger to general health,

d) Having good morals,

e) To speak Turkish sufficiently,

f) Have an income or occupation in Turkey that will provide a livelihood for oneself and one's dependents,

g) Not having any situation that would constitute an obstacle in terms of national security and public order,

Regarding Syrians under temporary protection, the requirement of five years of uninterrupted residence prior to the date of application under Article 11/1(b) of the TCC is of particular importance. Article 3/1(h) of the Regulation on the Implementation of the Turkish Citizenship Law[27] clearly states that the residence requirement of the Law can only be met by being in Turkey with legal permission. Article 25 of the Temporary Protection Regulation, on the other hand, clearly stipulates that the identity document issued to persons under temporary protection status only grants them a right to stay in Turkey, and that this document shall not be considered equivalent to a legal residence permit or a document substituting for a residence permit, shall not grant the right to transition to a long-term residence permit, and its duration shall not be taken into account in the total duration of the residence permit, and therefore does not entitle the holder to apply for Turkish citizenship. Therefore, it is concluded that Syrians under temporary protection status cannot become Turkish citizens through the general acquisition of citizenship.[28]

2. Exceptional Acquisition of Turkish Citizenship by Persons under Temporary Protection Status

In addition to the general acquisition of citizenship under Article 11, the TCC also regulates the acquisition of citizenship in some exceptional cases without the need to fulfill the conditions of Article 11. The exceptional cases of acquisition of citizenship are set out in Article 12 of the TCC.

According to Article 12/1(a) of the TCC, "*persons who bring industrial facilities to Turkey or who have rendered or are expected to render extraordinary services in scientific, technological, economic, social, sportive, cultural, artistic fields and for*

27 Official Gazette no. 06.04.2010/27544.

28 Ekşi (n 14) 200; Aygün, Kaya (n 15) 133; Sibel Özel, 'Suriyeli Sığınmacıların Kitlesel Olarak Türk Vatandaşlığına Alınması Meselesinin Hukuki Açıdan Değerlendirilmesi' (2017) 91(3) İstanbul Barosu Dergisi 21; Ali Kemal Nurdoğan, Mustafa Öztürk, 'Geçici Koruma Statüsü ile Türkiye'de Bulunan Suriyelilerin Vatandaşlık Hakkı' (2018) 23(3) Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 1171; Aybay, Özbek, Ersen Perçin (n 25) 118; Özel (n 21) 729; Özkan (n 14) 276; Rümeysa Partalcı, 'Geçiçi Koruma Statüsündeki Kişilerin Türk Vatandaşlığına Başvuru Şartları', Uluslararası Hukukta Göç ve Vatandaşlık (Yetkin Yayıncılık Ankara 2022) 316.

whom a reasoned proposal is made by the relevant ministries" may be naturalized by a Presidential decree, provided that they do not have any obstacles in terms of national security and public order. Therefore, Syrians under temporary protection status who individually meet the conditions in this paragraph can be naturalized as Turkish citizens.[29]

Paragraph (b) of Article 12 of the TCC also states that foreigners who have a residence permit pursuant to Article 31/1(j) of the LFIP and Turquoise Card holders, their foreign spouses, and the minor or dependent foreign child of the foreign spouse may also acquire citizenship exceptionally. The said Article 31/1(j) of the LFIP regulates that *"foreigners who are not working in Turkey but who will make investments within the scope and amount to be determined by the President of the Republic and their foreign spouses and their and their spouses' minor or dependent foreign children*" may obtain a short term residence permit. The necessary investments mentioned in this provision are determined by the Presidential Decree No. 106 published in the Official Gazette in 2018. Hence, Syrians who made the necessary investments and acquired a short-term residence permit may apply for the acquisition of Turkish citizenship through the "exceptional" way. However, there exists three significant obstacles before Syrians in relation to the said exceptional way of acquiring Turkish citizenship through investments: (i) Syrians under temporary protection cannot be granted a short-term residence permit; (ii) There exists a legal restriction on the rights of Syrians (be under temporary protection or not) in acquiring immovable property in Turkey. (iii) Syrians under temporary protection cannot obtain a Turquoise Card.

Relating to the first obstacle facing Syrians in acquiring Turkish citizenship through investment, the rule under Article 25 of the Temporary Protection Regulation constitutes a barrier in obtaining a short-term residence permit. This rule states that the right to stay in Turkey granted to those under temporary protection is not equivalent to a legal residence permit. Hence, Syrians under temporary protection cannot apply for the acquisition of Turkish citizenship through Article 12 (b) of the TCC[30]. Consequently, only those Syrians who had entered Turkish territory before the entry into force of the temporary protection decision by the Turkish authorities and hence those who are not under temporary protection may apply and receive a short-term residence permit.

Relating to the second obstacle facing Syrians in acquiring Turkish citizenship through investment, the restrictions in the acquisition of immovable property by Syrians in Turkey should be addressed. Article 35 of the Land Registry Law states that "*Foreign real persons who are citizens of countries determined by the President*

29 Özel (n 28) 24; Nurdoğan, Öztürk (n 28) 1171; Özel (n 21) 730.

30 Neşe Baran Çelik, "Güncel Gelişmeler Işığında Türk Vatandaşlığının İstisnai Haller Kapsamında Kazanılması" (2017) Türkiye Barolar Birliği Dergisi, 357, 408; Özel (n 21) 730.

of the Republic in terms of international bilateral relations and in cases where the interests of the country require it, may acquire immovable property and limited real rights in Turkey, provided that the legal restrictions are complied with". In this case, the President of the Republic is granted a wide discretionary power on this matter. Before moving on to the discretionary power of the President, it is necessary to assess the legal limitations to this issue as well, since where other legal limitations exist, the President will only be able to act in accordance with such limitations. Indeed, such limitations exist regarding real estate ownership of Syrians due to a conflict resulting from former land reforms in Syria.

In 1958, the land reform in Syria led to serious restrictions on the right to property. In Syria, foreign nationals cannot acquire immovable property through inheritance according to the Syrian inheritance law; therefore, Turkish citizens could not exercise their property rights on immovable properties in Syria which caused a serious loss of rights on behalf of Turkish citizens. Therefore, in line with the principle of reciprocity, the Turkish treasury has seized the immovable properties of Syrian nationals in Turkey. Pursuant to Law No. 1062[31] on Mutual Reciprocity, it is not possible for private and legal persons of Syrian nationality to acquire immovable property in Turkey. Indeed, regarding the immovable property in Turkey owned by Syrian citizens before Law No. 1062 was annotated, in the declarations section of relevant land registry reads as "seized in accordance with Law No. 1062". Syrian nationals are prohibited from acquiring new immovable property in Turkey[32]. On the other hand, it is disputed under the doctrine as to whether such restrictions are applicable to Syrians holding multiple or dual citizenships[33]. One view[34] argues that the restrictions apply to Syrian citizens and hence even if they hold other citizenships Syrians will still not be able to acquire immovable property in Turkey, and this includes holding of Turkish citizenship as dual citizenship as well. Another view[35], advocates that Law No. 1062 cannot be interpreted to restrict the ownership rights of a Syrian citizen if he/she holds another citizenship of a country against whom no such political sanctions can be applied. A different view[36] on the other hand, argues that the country with which the person whose ownership rights are in question has the closest connection shall determine whether Syrian citizenship and hence the sanctions under Law No. 1062 shall be taken into account or not. As a result, due to the restrictions

31 Official Gazette no. 15.06.1927/608

32 On the issues regarding the acquisition of immovables of Syrians in Turkey also see: Ayşe Yasemin Aydoğmuş, *Aihs'e Ek 1 No'lu Protokole Göre Yabancıların Türkiye'de Taşınmaz Edinmesi* (On İki Levha Publishing 2016) 105; Burak Huysal, "Suriye Arap Cumhuriyeti Vatandaşlarının Türkiye'de Bulunan Taşınmazlarına İlişkin Bazı Sorunlar ve Tespitler" (2007) 2 *Maltepe Üniversitesi Hukuk Fakültesi Dergisi*, 387; Fügen Sargın, *Yabancı Gerçek Kişilerin Türkiye'de Taşınmaz Mal Edinmeleri ve Sınırlı Ayni Haklardan Yararlanmaları* (Yetkin Yayınları 1997).

33 Güven Yarar, *Yabancıların Türkiye'de Taşınmaz Mal Edinmeleri"* (On İki Levha 2018) 92-93.

34 Selim Levi, *Yabancıların Taşınmaz Mal Edinmeleri*, (Legal Yayıncılık, 2006) 131.

35 Sait Kemal Obut, *Türk Hukukunda Yabancı Hakikî ve Hükmî Şahısların Aynî Haklardan İstifadesi* (Ankara Üniversitesi Siyasi Bilgiler Fakültesi Yayınları, 1956) 27, 99.

36 Huysal (n 32), 404-405.

under the said Law numbered 1062, it is not possible for Syrians to acquire Turkish citizenship exceptionally through investment by acquiring immovable property in Turkey.

In relation to the third obstacle that Syrians under temporary protection face in obtaining Turkish citizenship through Article 12 (b) of the TCC conditions for Turquoise Card ownership should be taken into account. The Turquoise Card is given to foreigners with the aim of attracting a qualified labor force to Turkey who will contribute to Turkey's economy and employment with their professional experience and level of education. Their spouses and dependent children are also given a document showing that they are relatives of the Turquoise Card holder, replacing the residence permit. However, pursuant to Article 11 of the International Workforce Law[37] it is not possible to issue the Turquoise Card to foreigners under temporary protection status. Therefore, the acquisition of Turkish citizenship through holding a Turquoise Card is not an option for Syrians under temporary protection.[38]

Finally, pursuant to Article 12 subparagraph (c) of the TCC, persons who are deemed necessary to be naturalized by a Presidential decree and persons who are accepted as "migrants" pursuant to subparagraph (d) may also acquire citizenship exceptionally. In practice, it seems possible to naturalize persons under temporary protection within the scope of the infinite discretionary power granted to the administration by Article 12/1(c) of the TCC. On the other hand, since Syrian nationals are not considered "migrants" pursuant to the Settlement Law, it does not seem possible for Syrians under temporary protection to benefit from the said subparagraph to acquire Turkish citizenship.

In the light of the aforementioned information, it can be said that persons under temporary protection status may apply for citizenship under the TCC not through the general way but only through some exceptional ways. However, before concluding this issue, it is necessary to examine the ways of acquiring citizenship through marriage.

3. Acquisition of Turkish Citizenship by Persons under Temporary Protection Status through Marriage

Article 16 of the TCC sets forth the conditions for the acquisition of Turkish citizenship through marriage. According to this Article, foreigners who have been married to a Turkish citizen for at least three years and whose marriage has been ongoing may apply for citizenship provided that they live in a family union, do not engage in activities incompatible with the union of marriage, and do not have any

37 Official Gazette No. 30007/14.03.2017.

38 Partalcı (n 28) 317; Çelik (n 30) 407.

circumstances that would constitute an obstacle in terms of national security and public order. Hence, Syrians under temporary protection status and who are married to a Turkish citizen may be naturalized if they also meet the said conditions under Article 16 of TCC.[39]

Article 16 of the TCC clearly lists the conditions for applying for citizenship through marriage. On the other hand, Article 10 of the TCC stipulates that *"a foreigner who wishes to acquire Turkish citizenship may acquire Turkish citizenship by the decision of the competent authority if he/she meets the conditions specified in this Law. However, fulfillment of the conditions does not confer an absolute right to acquire Turkish citizenship*". Indeed, a review of judicial decisions in Turkey in recent years reveals that applications to acquire Turkish citizenship through marriage have been rejected in significant numbers, some of which have been appealed to the higher courts. In one of the decisions of the Council of State[40], the discretionary power of the administration has been emphasized and it has been stated that *"According to the information and documents to be obtained as a result of the investigation of whether the plaintiff meets the conditions sought in the legislation by the administration, it is undoubted that the request to be naturalized as a Turkish citizen may be rejected by the administration for reasonable and acceptable reasons in accordance with the law, and that the administration may examine and finalize the application based on its discretionary powers by evaluating the information and documents in the file regarding the transactions established concerning naturalization.*" Similarly, in another decision, the Council of State[41] has emphasized that along with the foreign applicant the Turkish spouse may also be evaluated within the scope of the conditions under Article 16 of TCC, especially on the condition of public security. This examination has been considered as within the scope of the discretionary authority of the administration. It has been held in a decision by the Council of State that *"it is a consequence of the sovereignty right of the State in the matter of citizenship that the application conditions stipulated in the legislation that the applicants must meet for the acquisition of Turkish citizenship through marriage should be examined not only in terms of the applicant foreigner but also in a way to cover both spouses."*. It is also evident that the relationship between the applicant and his/her Turkish spouse as well as their family life are taken into consideration along with the conditions that the applicant needs to fulfill individually himself/herself. For example, in another decision, the Council of State[42] has stated that *"...in this case; although it was reported*

39 Ekşi (n 14) 199; Kaya, Eren Yılmaz (n 21) 64; Aygün, Kaya (n 15) 134; Nurdoğan, Öztürk (n 28) 1171; Özel (n 21) 731; Özkan (n 14) 275; Partalcı (n 28) 319.

40 10th Chamber of the Council of State, Case No. 2016/813, Decision No. 2020/4671.

41 District Administrative Court of Ankara 10th Administrative Law Chamber, Case no. 2020/1250 Decision no. 2020/1427 Date. 15.09.2020.

42 District Administrative Court of Ankara 10th Administrative Law Chamber, Case no. 2020/380 Decision no. 2020/1705 Date. 6.10.2020.

in the security investigation that the plaintiff's marriage with his spouse was intended to establish a family, from the information and documents attached to the file, some negative findings were seen regarding the life of the plaintiff's spouse and his family before marriage, while it is understood that there are no children born within his marriage. On the other hand, meeting the conditions sought by the legislation does not give an absolute right to the person, and that the discretion of the administration is wide within the scope of the State's sovereignty right in this regard...".

Pursuant to Article 16 of the TCC, the marriage must be a genuine marriage and couples must live in a family union. In one of its judgments, the Council of State[43] drew attention to some of the elements sought for the condition of living in family unity by stating that *"...the parties do not have a common residence, they do not live in family unity, no one in the neighborhood where the plaintiff lives has seen or knows the Turkish citizen spouse, the Turkish citizen spouse works as a watchman and gardener and the owner of the house where the plaintiff lives does not have any knowledge about either the marriage or the plaintiff..."*. On the other hand, it is also important to explain what "family unity" means in terms of acquiring citizenship in this way. "Family unity" is a broader condition than the condition of actually living together in a household -a condition that used to be sought under the previous Turkish Citizenship Act no. 403[44]. The condition of living in a family unity while encapsulating sharing the same household does not necessarily exclude the instances where the spouses do not live together due to compelling reasons[45]. For example in a previous case subjected to decision by the Council of State[46], the foreign spouse who was not sharing the same household with Turkish spouse who was at the time in prison was nevertheless granted Turkish citizenship through marriage since the spouses were morally bound to be together as the foreign spouse continued living the same apartment as her Turkish spouse and was supporting the Turkish spouse financially during the time he was in prison.

Death of the Turkish spouse will not constitute an obstacle to fulfill this condition of maintaining family union on the condition that the application to acquire Turkish citizenship was made before the death of the Turkish spouse. Article 16/2 of TCC stipulates that family unity will not be sought in the event of the death of the Turkish citizen spouse if the death occurs *after* the application of the foreigner. It is stated that if the marriage is terminated due to the death of the Turkish citizen spouse, the condition of "unity of marriage" will no longer be sought. This rule is also echoed under Article 25 of the Regulation on the Implementation of the Turkish Citizenship

43 10th Chamber of the Turkish Council of State, Case no. 2012/5540 Decision no. 2015/4312 Dated 10.03.2021.

44 Official Gazette no. 22.02.1964/11638.

45 Güngör (n 25) 139-140.

46 10th Chamber of the Turkish Council of State, Case no. 2016/13579 Decision no. 2021/1030 Dated 13.10. 2015

Code[47], and accordingly it is stated that prior to the date of application for the acquisition of Turkish citizenship though marriage, if the marriage is terminated due to reasons such as death, then the application shall be inadmissible.

It is possible for a person who has a temporary protection status and acquires Turkish citizenship through marriage with a Turkish citizen to maintain his/her Turkish citizenship upon divorce from his/her Turkish spouse. According to Article 12 (e) of the Temporary Protection Regulation, acquisition of Turkish citizenship is one of the individual terminations of this status. In this case, the person becomes a Turkish citizen and the divorce will not result in the loss of his/her acquired citizenship.

In the event that the marriage of the Turkish spouse and the foreigner is null and void, Article 16/3 of TCC states that "*foreigners who acquire Turkish citizenship through marriage shall retain their Turkish citizenship if they are in good faith in the marriage in the event that the marriage is null and void.*" Therefore, the good faith of the Syrian under temporary protection will be important for the acquisition or continuation of citizenship in case the marriage is null and void.

In terms of the citizenship of the children born in a marriage between a Turkish citizen and a person under temporary protection status, Article 7/1 of the TCC shall be taken into account. This Article stipulates that a child born in a marriage to a Turkish citizen mother or father will be a Turkish citizen, regardless of whether they are born in or outside of Turkish territory.

In the light of the explanations above on Article 16 of TCC, it is concluded that it is legally possible for Syrians under temporary protection status to acquire Turkish citizenship through marriage. However, the acceptance of such application for acquiring citizenship will depend on the discretionary power of the administration by passing through various examinations whether the conditions are met in accordance with the relevant legal provision. Where the marriage concluded under Syrian law is considered as manifestly contrary to Turkish public policy which indirectly affects the acquisition of the Turkish citizenship of a Syrian under temporary protection.

4. Acquisition of Turkish Citizenship by Persons under Temporary Protection Status through Adoption

Pursuant to Article 17 of the TCC, "*A minor adopted by a Turkish citizen may acquire Turkish citizenship as of the date of the decision, provided that he/she does not have a situation that would constitute an obstacle in terms of national security and public order*".

47 Official Gazette no. 06.04.2010/27544.

It should be noted that there is no legal obstacle for minors under temporary protection status who are adopted by a Turkish citizen to acquire Turkish citizenship in accordance with Article 17 of the TCC, provided that such an adoption does not constitute an obstacle to national security and public order.[48] An adoptee under temporary protection status may acquire citizenship upon a court decision authorizing the adoption and the decision of the Ministry of Interior Affairs.[49] However, in practice, the General Directorate of Child Services of the Ministry of Family and Social Services is of the opinion that Turkish citizens can only be foster parents for persons under temporary protection status. Article 5 of the Directive on Unaccompanied Minors of the General Directorate of Child Services[50] states that children will benefit from foster family services, considering their views and best interests. Despite this approach in practice, theoretically according to Article 17 of the TCC, to acquire citizenship, the adoption of persons under temporary protection status by Turkish citizens shall be a possible way of acquiring Turkish citizenship[51].

Finally, it is important to note that Syrian nationals who acquire Turkish citizenship though any of the possible ways described above might later encounter problems with regards to the validity of their marriage if they had concluded multiple marriages under Syrian law which allows for polygamy under certain conditions. In a recent judgment the 2nd Chamber of the Turkish Court of Cassation[52] annulled the second marriage of a Syrian national based on the provisions of Turkish Civil Code which stipulates former marriage as an obstacle to conclude a valid marriage. Further, when it is considered that the Republic of Turkey was established as a secular state under the Constitution, polygamy shall be strictly against Turkish public policy. In the said judgment, the Syrian national who had acquired Turkish citizenship had two marriages both of which are valid under Syrian law. Nevertheless, following his acquisition of Turkish citizenship, his second marriage was annulled by the Court of Cassation. It is important to note that in this judgment Çetin Durak, a member of the 2nd Civil Chamber of the Court of Cassation, provided a dissenting opinion. Accordingly, in his view the marriages had taken place while both of the spouses were Syrian nationals. Pursuant to Article 13 of the Turkish Private International Law and International Civil Procedure Law, the legal capacity to marry and the conditions thereof shall be governed by the respective national laws of the parties at the time of the marriage, which in this case points out Syrian law that allows for polygamy. Whilst the said decision had significant critical media coverage[53], until a different

48 Kaya, Eren Yılmaz (n 21) 64.

49 Özkan (n 14) 276.

50 For the text of the directive, see https://www.aile.gov.tr/uploads/sgb/uploads/pages/yonergeler/refakatsiz-cocuklar-yonergesi-20-10-2015.pdf, (Access date: 21.02.2023).

51 Partalcı (n 28) 320.

52 The decision is not yet been publicly available.

53 Examples to such media coverage could be shown as follows: Cumhuriyet Newspaper "Precedent by the Court of Cassation

Court of Cassation decision is made, the practice shall be that the second marriages concluded under Syrian law shall be annulled if one of the spouses acquire Turkish citizenship.

IV. Conclusion

This paper examines the conditions under which Syrians under temporary protection status in Turkey may apply for a Turkish citizenship. In examining this issue, the paper initially focuses on the types of international protection statuses under Turkish international protection law namely "refugee", "conditional refugee" and "subsidiary protection" statuses. Following a brief review of the said statuses, the temporary protection status is explained. In this context, it is concluded that temporary protection is not a type of international protection status but a precautionary protection status subject to domestic law.

Following the examination and characterization of the temporary protection status, the possible ways of acquisition of Turkish citizenship by Syrians under temporary protection status are analyzed. Firstly, the acquisition of Turkish citizenship by birth is described through the rules set forth under TCC and the Turkish Constitution.

For those under temporary protection status, it is stated that there may be some exceptional cases where the principle of place of birth under Article 8 of the TCC may be applied. Following this, ways of acquisition of Turkish citizenship by the decision of the competent authority are evaluated in detail. In this regard, initially, the conditions for general naturalization are taken into consideration. Article 25 of the Temporary Protection Regulation states that the right to stay in Turkey granted to those under temporary protection is not equivalent to a legal residence permit, which constitutes an obstacle in terms of the five-year uninterrupted residence requirement set out in Article 11/1(b) of the TCC for general naturalization. Therefore, it is concluded in this section that Syrians under temporary protection status will not be able to acquire Turkish citizenship through the general naturalization route.

Secondly, within the scope of acquisition of Turkish citizenship by the decision of the competent authority, the conditions for exceptional naturalization under Article 12 of the TCC are examined. Within the scope of this Article, it is concluded that Syrians under temporary protection status who individually fall within the scope of Article 12/1(a) of the TCC may be naturalized as Turkish citizens. In addition, it is also explained in this section that, in practice, it seems possible to naturalize persons

regarding 'polygamous' Syrians who acquired Turkish citizenship" <https://www.cumhuriyet.com.tr/turkiye/yargitaydan-turk-vatandasligina-gecen-cok-esli-suriyelilere-iliskin-emsal-karar-2023964> accessed: 13.04.2023; DHA News Agency "Approval from the Court of Cassation to the annulment of the second marriage of a Syrian Turkish citizen" <https://www.dha.com.tr/gundem/yargitaydan-turk-vatandasi-suriyelinin-ikinci-evliliginin-iptaline-onama-2194251> accessed: 13.04.2023.

under temporary protection within the scope of the infinite discretionary power granted to the administration by Article 12/1(c) of the TCC. It is also stated under this section that Syrians under temporary protection are not authorized to own real estate in Turkey, cannot be granted a short-term residence permit or that they cannot hold Turquoise Card due to the restrictions stated under relevant laws. Therefore, the acquisition of Turkish citizenship through real estate investments or as a holder of a Turquoise Card are not possible routes for Syrians under temporary protection.

The other provisions examined under the section regarding naturalization by the decision of the competent authority are Article 16 and Article 17 of the TCC. Article 16 of the TCC stipulates the conditions for naturalization through marriage. Syrians under temporary protection can acquire citizenship through a marriage with a Turkish citizen if they meet the conditions set forth under Article 16 of TCC. Article 17 of the TCC regulates naturalization through adoption. Theoretically, there is no obstacle for Syrians under temporary protection status to be naturalized under Article 17 of the TCC. However, in practice, Turkish citizens are only accepted as foster parents for minors under temporary protection status and adoption of Syrian minors is not allowed.

Overall, this paper sets forth possible ways of obtaining Turkish citizenship for those Syrian citizens that are under temporary protection status in Turkey. While certain particularities and restrictions under the relevant law, the discretionary powers of the administrative authorities as well as Turkish public policy concerns may cause obstacles in the acquisition of Turkish citizenship, theoretically there are various possible ways of naturalization for Syrians that are under temporary protection in Turkey.

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RESEARCH ARTICLE

"Inherent Vice of the Goods" Exception in the frame of "*Volcafe Ltd and Others v. Compania Sud Americana de Vapores SA*" Decision: An Assessment under Turkish-German Law*

Melda Taşkın**

Abstract

The United Kingdom Supreme Court, in "Volcafe Ltd and others (Appellants) v. Compania Sud Americana De Vapores SA" case set forth an important principle related to burden of proof for the exceptions of carrier's liability counted in Art.IV/2 of the Hague Visby Rules and decided that "the carrier is under the obligation to substantiate the due diligence for the protection of the goods carried". According to Art.1182 of the Turkish Commercial Code (TCC), titled "the Circumstances that provide Presumption related to Causality and Absence of Negligence to the Carrier", "damages arise from the inherent vice or characteristics of the goods" is accepted as an exception which facilitates the exclusion of the liability of the carrier. On the other hand, the German Commercial Code (HGB §499,3) includes a provision which states explicitly that "the carrier may avail itself of the defences related to the inherent characteristics of goods only if it has taken all of the measures in respect of the use of specific equipment". This study aims to review the provisions in both Turkish and German Law related to the exception of "inherent vice of the goods" and making a remark taking into consideration of the United Kingdom Supreme Court's decision.

Keywords

Volcafe Case, İnherent Vice of the Goods, Exceptions of Carrier's Liability, Excepted Perils, Burden of Proof

* This study is an extended –developed -English version of the oral presentation titled "Volcafe Ltd and others (Appellants) v. Compania Sud Americana De Vapores SA" Kararı ve İspat Yüküne İlişkin Türk ve Alman Hukuku Çerçevesinde Bir Değerlendirme" which has been presented for "Case Law Symposium: Recent Developments in Domestic, International, And Foreign Judiciaries", organized by Koç University Law School, 7 October 2022.

****Corresponding Author:** Melda Taşkın (Asst. Prof. Dr.), Istanbul University, Faculty of Law, Department of Maritime Law, Istanbul, Turkiye. E-mail: melda.taskin@istanbul.edu.tr ORCID: 0000-0002-4922-2451

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I. Introduction

The United Kingdom Supreme Court in the decision of "Volcafe Ltd and others (Appellants) v. Compania Sud Americana De Vapores SA"[1] dated 5.12.2018, ruled an important principle about the burden of proof in the presence of one of the exceptions in the Hague-Visby Rules Art.IV/2.

The judgment is about coffee beans shipped from Colombia on various vessels owned by the defendant shipowners for carriage to Bremen. Although all the walls of the containers were covered with craft papers as a precaution against condensation damages, when the containers were opened at the port of discharge, it was seen that the bags in the containers were soaked and the coffee beans were damaged because of condensation. The cargo owners alleged that condensation damage occurred because of using insufficient paper and asserted that the carriers who failed to use enough paper to cover the containers, breached their duty of care to cargo which is also ensured in HVR Art.III/2. Carriers joined issue on these claims; they asserted that condensation damage resulted from inherent vice of the coffee beans and they couldn't be held responsible relying on the exception in HVR Art.IV/2(m). In the frame of these allegations and defences, the Supreme Court held that "the carrier has the legal burden of proving that they took due care to protect the goods from damage, including due care to protect the cargo from damage arising from inherent characteristics such as its hygroscopic character".

Art.1182 of the Turkish Commercial Code (TCC) numbered 6102, contains an exception list which consists of situations that facilitate the exclusion of the carrier's liability. This list also includes the exception of "loss or damage arising from inherent vice of the goods"(TCC Art.1182/1(f)). The important point necessary to emphasize related to the Volcafe case is that, differently from HVR, TCC includes a statement about burden of proof related to this exception list. According to this, if loss or damage arises from one of the exceptions counted in this list, it is presumed that "carrier has no fault or neglect".

On the other hand, a relevant provision of the German Handelsgesetzbuch (HGB) and tendency of German legal doctrine is remarkable. The German Legislator has drawn up a special provision in §499,3 which has a similar exception list with HVR. According to this, "If the carrier, by virtue of the contract for carriage of general cargo, is under obligation to protect the goods particularly from the effects of heat, cold, variations in temperature, humidity, vibrations or similar effects, then the carrier may avail itself of the defences set out in subsection (1) first sentence number 6 *("Inherent features or characteristics of certain goods")* only if it has taken all of the measures incumbent upon it in light of the circumstances, in particular in respect of

1 *Volcafe Ltd. and others (Appellants) v. Compania Sud Americana De Vapores SA*, [2018] UKSC 61.

the choice, maintenance, and use of specific equipment". Acceptance of the German doctrine about the burden of proof related to this exception, which has existed in German Law before "Volcafe", has an important similarity with the tendency of the UKSC in "Volcafe". So it is useful to examine this principle of the German Law and the reasons in its background.

In the frame of this explanations, in this study, at first, the principles in the "Volcafe" decision related to the burden of proof will be explained; the provision of HGB §499,3 and tendency in German Law will be examined; in the end, in the direction of the "Volcafe" decision and the principles in German Law, an evaluation will be carried out about propriety of TCC Art.1182 which strengthens the carrier's hand related to burden of proof significantly, by taking into consideration today's conditions of maritime practice.

II. An Outline of the "*Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*" Decision

The lawsuit of "Volcafe Ltd. and others v. Compania Sud Americana De Vapores SA" is basically related to coffee beans which were loaded into the different ships belonging to defendant shipowners to be carried from Columbia to Bremen between January the 14th and April the 6th, 2012. Six Plaintiffs were also the holders of both of the bills of ladings and nine different packed green coffee beans which were sent to be carried to Bremen. The green coffee beans were loaded into a total of 20 "unventilated" 20-foot containers. As it is known and emphasized in the decision especially, the coffee beans absorb, stock and then spread the moisture as a consequence of the inherent vice of this kind of goods. In fact, in practice, coffee beans can be carried in ventilated or non-ventilated containers[2]. However, in 2012, when this case occurred, both ventilated and non-ventilated containers were used commonly to carry these kinds of goods, and the shippers in the current case had determined to use non-ventilated containers for coffee beans. On the other hand, it is known that using a non ventilated container is cheaper than using a ventilated one; but if a non-ventilated container is used to carry green coffee beans from a hot climate to a cold climate, coffee beans spreading the moisture is inevitable which causes the condensation on the walls and roofs of the container[3].

Because of this, it is necessary to cover all inner surfaces, especially roofs and walls

2 For a more comprehensive information about Volcafe Ltd and others v. Compania Sud Americana De Vapores SA" Case, see, *Volcafe Ltd. and others (Appellants) v. Compania Sud Americana De Vapores SA*, [2018] UKSC Para 1-4. To see full text and the legal processes of the Volcafe case see, <https://www.supremecourt.uk/cases/uksc-2016-0219.html> accessed 14 February 2023.

3 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para.3. For a brief outline of the decision of the High Court and Court of Appeal, see also, Sinem Ogis and Edward Kafeero, "Volcafe Case - Common Law vs.Visby Hague Rules: Is It One Versus Another?", (2020) XVII (2) YUHFD 751 ff; Sinem Ogis, "Lahey Kuralları ve Volcafe Davası Türk Hukuku Açısından Bakış", (2020) 15 (169) THD 1865 ff.

of the container, with a sorbent material like craft paper to protect the goods in the container against water damage. Dressing containers with craft paper was a common commercial method for the term this lawsuit was filed and so the carrier covered the containers subject to this case with craft paper. On the other side, the bills of lading in this case were subject to English Law and jurisdiction and also incorporated the Hague Visby Rules. The bills of lading also included LCL/FCL terms which meant carriers would be liable for the preparation of the containers and loading the coffee beans into the containers according to the terms of contract of carriage of goods by sea. When the ship arrived in Bremen, it was seen that all of the packages in a total of 18 containers were damaged because of moisture[4].

The Plaintiffs alleged basic arguments which were known and used for similar cases for years. According to this, the first allegation was related to the carriers' breach of the duty of delivering the goods in good condition as it is shown in the bill of lading. They also alleged that the carriers did not load, handle or carry properly and carefully and so they had also breached Art. III/2 of the Hague Rules, as an alternative allegation to the previous one. Except these, although some other allegations had also been presented by the Plaintiffs, the most important one says that the carriers did not use enough craft paper to protect the coffee beans from moisture. In response to this, the Defendant Carriers took objection to the Plaintiffs' allegations and asserted that the coffee beans could not tolerate the condensation occurred at the time of passing from hot climate to cold, so the moisture damage had occurred because of an inherent vice of coffee beans.

According to the Supreme Court, the main principle of the Hague Visby Rules is to limit the (liability) exceptions the carrier can be leaned and standardise the liability of carrier[5]. Except for Art. IV/1 and Art.IV/2(q) which set forth special principles of burden of proof with special aims, the Hague Visby Rules are not interested in the manner of burden of proof or distribution of burden of proof. In principle, these matters which are related to burden of proof are in the scope of international private law and are subject to procedural law which can differ in the frame of conditions of concrete judgement[6].

4 *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para 3 ff.

5 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para.15. The same aim related to exceptions of carrier's liability has also been emphasized in German Law so many times. For related explanations in German Law, Dieter Rabe and Uwe Bahnsen, *Seehandelsrecht: Fünftes Buch des Handelsgesetzbuches mit Nebenvorschriften und Internationalen Übereinkommen*, (5th edn, Verlag C.H. Beck 2018) § 512 Rn 46, Rn 29. See also, Rolf Herber and Eva M. Harm, *Münchener Kommentar zum Handelsgesetzbuch: HGB - Band 7: Transportrecht*, (5th edn, Verlag C.H. Beck 2023) § 499 Rn 1 ff.

6 The Supreme Court explains this exactly like this: *"…But they are not exhaustive of all matters relating to the legal responsibility of carriers for the cargo. As is well known, the background against which they were drafted was the attempt of (mainly British) shipowners inthe late 19th century to limit their legal responsibility for cargo, and the attempt of other countries, notably the United States, Canada and Australia, to impose a minimum standard of performance by law. The purpose of the Rules was to standardise the obligations of the carrier and to limit the exceptions on which he should be entitled to rely…*" See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para15

In a similar way, the Court emphasized that the civil law principles of each country which also accepted the Hague Rules can differ, and exemplified this with the current situation in Belgium, Germany, France, Italy, Norway and Spain. In the frame of these explanations, the Court especially referred to "the Albacora" case[7]. In this case, which is related to the matter of whether the good of fish was available to carry in non-refrigerated parts of the ship or not, the Court used these expressions exactly to solve this problem: "…if an article is unfitted owing to some inherent defect or vice for the voyage which is provided for in the contract, then the carrier may escape liability when damage results from the activation of that inherent vice during the voyage." It follows that whether there is inherent defect or vice must depend on the kind of transit required by the contract. If this contract had required the refrigeration there would have been no inherent vice. But as it did not, there was inherent vice because the goods could not stand the treatment which the contract authorised or required.[8]" On the other hand, the Court also referred to the "Scrutton on Charterparties and Bills of Lading" (23rd ed (2015), Para 11.055). According to this, "By 'inherent vice' means the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the shipowner is required by the contract to exercise in relation to the goods."[9] Then the Court highlighted that "if the carrier could and should have taken precautions which would have prevented some inherent characteristic of the cargo from resulting in damage, that characteristic is not an inherent vice. Accordingly, in order to be able to rely on the exception for inherent vice, the carrier must show either that he took reasonable care of the cargo but the damage occurred nonetheless; or else, that whatever reasonable steps might have been taken to protect the cargo from damage would have failed in the face of its inherent propensities"[10]. Finally, the Court reached this conclusion, "the carrier had the legal burden of proving that he took due care to protect the goods from damage, including due care to protect the cargo from damage arising from inherent characteristics such as its hygroscopic character"[11].

III. Circumstances of Carrier's Non-Liability in Turkish Commercial Code

The Hague - Visby Rules, which set forth general principles for liability of carrier in Art. II, also include some exceptions to eliminate the liability of the carrier with Art. IV/1 and IV/2. According to Art. IV/1, "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused

7 *Albacora SRL v Westcott & Laurence Line Ltd* [1966] UKHL J0622-2, To see full text, <https://www.i-law.com/ilaw/doc/view.htm?id=145948> accessed 24 February 2023. For explanations on this case, see also, Sarah C. Derrington, "Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules" 1997 (3) International Trade and Business Law Annual 178.

8 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*, Para 35

9 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*, Para 36

10 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA*, Para 37

11 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA,* Para 43

by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation" and by this means, an exception is provided for carrier's liability caused by unseaworthiness of the ship at the beginning of the voyage set forth in § 1 of Article 3[12].

On the other hand, the next paragraph involves an exception list which is alleged to be implemented for liability of the carrier arising from breach of due diligence set forth in Art. III/2. Since "damages come from wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods" (Art. IV/II(m)) is also counted in this list frankly, the carrier cannot be liable for the damages which arise from inherent vice of the goods in principle[13]. In respect to the Turkish Commercial Code numbered 6102, although the Legislature in Turkey grounded on these provisions of the Hague Visby Rules, all occasions in this list were not counted as an exception to carrier's liability. In this context, the Turkish Commercial Code includes some exception provisions that relieve the carrier of the liability under the title of "Circumstances for Exoneration from Liability". According to Art.1179 of TCC, which is a general provision which sets the carrier free, the carrier would not be liable for the damages which arise from neither the neglect nor the fault of the carrier or his servants. Besides this, Art. 1180 of TCC sets forth that the carrier will be liable for only his own neglect for the damages occurred as a result of fire or navigation or in the management of the ship; Art.1181 of TCC ensures the carrier will not be liable because of the damages related to saving or attempting to save life or property at sea. The exceptions to carrier's liability are not limited to the provisions between Art. 1179-1181; except these, the carrier has also opportunity to eliminate his liability under the circumstances

12 For comprehensive explanations about exceptions to carrier's liability in Hague Visby Rules see also, Marel Katsivela, "Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague/Visby Rules" (2010) 40(2) Revue Generale de Droit 413 ff; Derrington (n5)175 ff.; Guenter H. Treitel and Francis M.B. Reynolds, *Carver on Bills of Lading*, (3rd edn, Sweet & Maxwell 2011) Para. 9-206, 704. The Author says that "while Art. II of the Hague Visby Rules sets forth main principles of the carrier's liability, Art. IV is about the defending possibilities; because of this in Art. IV/1, defending causes for liability of the carrier arise from the unseaworthiness of the ship at the beginning of the voyage are given place; the seperate exception list in Art. IV/2 is related to carrier's duty of care; in other words while Art. IV/1 ensures the exceptions for liability caused by unseaworthiness at the beginnging of the voyage, Art. IV/II sets forth the exceptions of carrier's liability for duty of care". Explanation in similar way, see also, Derrington (n5) 176. For explanations about exceptions to liability of the carrier in Hague - Visby Rules, see also, Hans Gramm, Das neue Deutsche Seefrachtrecht nach den Haager Regeln (Gesetz vom 10 August 1937 - RGBl. I Seite 891), (1st edn, Verlag von E.S. Mittler & Sohn 1938) 124 ff; Heinz Prüssmann and Dieter Rabe, *Seehandelsrecht: Fünftes Buch des Handelsgesetzbuches mit Nebenvorschriften und Internationalen Übereinkommen*, (4th edn, Verlag C.H. Beck 2000) §608, Rn.1; Rabe and Bahnsen (n3) §499, Rn.2; Steward C. Boyd, Andrew S. Burrows and David Foxton, *Scrutton on Charterparties and Bills of Lading*, (20th edn, Sweet&Maxwell 1996) 443. This view also accepted in German Law before the Maritime Law Reform in 25.04.2013, and this was justified with the aim to limit the exceptions for carrier's liability ("*Zweck der eingeschränkten Verschuldenszurechnung"*) in Hague - Visby Rules which also constitutes the ground of the related provision in HGB and as a consequence of this aim it was alleged that these exceptions had to be interpreted in a restricted manner. *(BGH (Urt. V. 28.6.1971 – II ZR 66/69) B*GHZ 56, 300 ("Neuwied"), Rabe and Bahnsen (n3) § 512, Rn.46, Rn.29. See also, Hans Wüstendörfer, *Neuzeitliches Seehandelsrecht*, (2th edn, Verlag Paul Siebeck, 1950) 274.

13 For more detailed information about this exception see, Boyd, Burrows and Foxton (n10) 445; Treitel and Reynolds (n7) 716; Gramm (n 8) 130 ff; Prüssmann and Rabe (n 9) §608 Rn 17; Rabe and Bahnsen (n3) §499 Rn 56 ff; Katsivela (n6) 453 ff.

of Art. 1220 titled "Reasonable Deviation" and Art. 1186 which sets the carrier free "if the nature of value thereof has been knowingly misstated by the shipper in the bill of lading". On the other side, other exceptions named in Art.IV/II of the Hague Visby Rules are given place in Art. 1182 of TCC under the title of "Circumstances that provide the carrier presumption for faultlessness and existence of causal relation" as the reasons that make the burden of proof easier to eliminate the carrier's liability[14]. These reasons, named "circumstances for probable non-liability of the carrier" by doctrine, as it can be understood from the title, do not provide the carrier a "non-liability" directly; existence of one of these circumstances just provides to the carrier easiness for burden of proof to exonerate their liability. The Turkish Legislator counted these reasons in 8 different paragraphs, as "Perils, dangers and accidents of the sea or other navigable waters; "act of war, act of public enemies; arrest or restraint of princes, rulers or people, or seizure under legal process or quarantine restrictions; strikes or lockouts or another stoppage or restraint of labour; riots and civil commotions; act or omission of the shipper or owner of the goods, his agent or representative; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; insufficiency of packing; insufficiency or inadequacy of marks". As the Legislator stated frankly with this provision, "if the damage occurs because of one the reasons counted in this list, it will be accepted that the carrier and his servant-agents have no neglect or fault and if it is possible that the damage is caused by one of these reasons under the circumstances of the concrete case, it will be accepted the damage has been caused by this reason" (Art. 1182/1,3, TCC). At that rate, if one of these reasons is proved in a concrete case, it cannot be possible for the carrier to eliminate their liability directly unlike Art. IV/2 of the Hague Visby Rules; on the contrary, a presumption of absence of negligence and another presumption of existence of causation between damage and the exception listed in article will occur[15].

IV. A Review in the frame of Para. 499 of German Commercial Code (HGB)

Under German Law, before the Maritime Law Reform in 2013, for the damages arisen from inherent vice of the goods, there was a similar regime with Art. 1182 of

14 About these occasions which provide to the carrier easiness to eliminate his liability and called as "presumptive non-liability occasions", see also, Kübra Yetiş Şamlı, *6102 sayılı Türk Ticaret Kanunu'na Göre Taşıyanın Zıya, Hasar ve Geç Teslimden Sorumluluğu,* (1st edn. On İki Levha 2013) 220 ff; for comprehensive information about excepted perils in old TCC numbered 6762, see also, Tahir Çağa and Rayegân Kender, *Deniz Ticareti Hukuku – II: Navlun Sözleşmeleri,* (9th edn, On İki Levha 2009) 160 ff; Sami Okay, *Deniz Ticareti Hukuku II: Navlun Mukaveleleri* (1st edn. 1968) 207 ff.; Sami Akıncı, *Deniz Hukuku: Navlun Mukaveleleri*, (1st edn. İstanbul Üniversitesi Hukuk Fakültesi Yayınları 1968) 443 ff; Fehmi Ülgener, *Taşıyanın Sorumsuzluk Halleri*, (1st edn. Der 1991) 95 ff. For comprehensive explanations and assessments about Turkish Law, see also, Pınar Akan, D*eniz Taşımacılığında Taşıyanın Yüke Özen Yükümlülüğünün İhlalinden Doğan Sorumluluğu* (1st edn. 2007); Hakan Karan, "*The Carrier's Liability For Breach of The Contract of Carriage of Goods by Sea Under Turkish Law*" (2002) 33 J. Mar. L. & Com. 91 ff**;** Vural Seven, *Taşıyanın Yüke Özen Borcunun İhlalinden (Yük Zıya ve Hasarından) Doğan Sorumluluğu* (1st edn. 2003)

15 For detailed explanations on consequences of presumptive non-liability circumstances in Art. 1182, TCC, see also, Ülgener (n16) 95; Yetiş Şamlı (n12) 220 ff.

Turkish Commercial Code. Although it has not been mentioned in the preambles of neither the Turkish Commercial Code numbered 6102 nor the old Turkish Commercial Code numbered 6762, in this provision of Handelsgesetzbuch (a.F. §608) which also constituted the source of the related provisions in both the current and the old Turkish Commercial Code, there was an exception list in which also "the inherent vice of the goods" was also counted, under the title of "Assumed - Non-liability of the carrier (*Vermutete Nichthaftung des Verfrachters*)"[16]. This article ensured that if the damage arises from one of these circumstances, the carrier would not be liable, and if it is possible the damage is caused by one of these reasons, it is assumed that the damage occurred by this reason (HGB §608 Abs.2 (a.F.). On the other hand, similar with the related provision in the Turkish Commercial Code, HGB §608 (a.F.) also set forth that if the negligence of the carrier is proven, it could not be possible for the carrier to eliminate their liability based on this article.

On the other hand, it is important to highlight that in the course of the time, developments of sea transport have prevented loss or damage of goods arisen from inherent vice by using a cargoworthy container or taking some measures for loading the goods. The Legislator in Germany took this situation into consideration and set forth a special provision for "the damages arisen from inherent vice of the goods" which also constitutes an exception for carrier's liability in HGB. According to HGB § 499 titled "Particular grounds for exclusion of liability", "Inherent features or characteristics of certain goods that make them particularly susceptible to damage, particularly through breakage, rust, internal spoiling, drying, leakage, or normal wastage in bulk or weight" are counted as exceptions to carrier's liability; however in the next paragraph of the same article, there is another principle which states that "The first sentence[17] shall not apply if the goods were carried by a ship that was not seaworthy or not cargoworthy.[18]" On the other hand, HGB §499, Abs.3 also includes an important provision which ensures that "If the carrier, by virtue of the contract for carriage of general cargo, is under obligation to protect the goods particularly from the effects of heat, cold, variations in temperature, humidity, vibrations or similar effects, then the carrier may avail itself of the defences set out in subsection (1) first sentence number 6 only if it has taken all of the measures incumbent upon it in light of the circumstances, in particular in respect to the choice, maintenance, and use of specific equipment, and only if it has complied with any special instructions

16 For more comprehensive information about HGB §608 (a.F.) and especially about consequences of the existence of the circumstances in this list, see also, Gramm (n8) 123 ff.; Prüssmann and Rabe (n9) §608, Rn 1 ff.; Wüstendörfer (n11) 275 ff.; Yazıcıoğlu, Emine, *Kender – Çetingil Deniz Ticareti Hukuku*, (17th edn, Filiz Kitabevi 2022) 401 ff.; Hans Jürgen Puttfarken, *Seehandelsrecht*, (1st edn, Verlag Recht und Wirtschaft 1997) 64 ff.; Andreas Hoffmann, *Die Haftung des Verfrachters nach deutschem Seefrachtrecht*, (1st edn, Neuwied 1996) 46 ff.

17 The first sentence states that "If damage has occurred which, given the circumstances, might have been due to one of the risks set out in subsection (1) first sentence, then the presumption shall be that the corresponding damages have in fact been caused by this risk."

18 For explanations about HGB §499, see, Rabe and Bahnsen (n3) §499, Rn 7 ff; Hartmut Oetker and Marian Paschke, *Handelsgesetzbuch Kommentar*, (7th edn, C.H. Beck Verlag 2021) § 499 Rn. 1 ff; Herber and Harm (n4) § 499 Rn 1 ff.

that may have been issued." In this context, if a carrier demands to benefit from the advantage of non-liability provided by HGB 499 Abs.1(6) it is not enough to prove that the damage occurred from inherent vice of the goods, the carrier must also prove they have taken all of the measures to choose, maintanance and usage of the equipment like containers they provide. Besides this, the carrier must prove that they have implemented all of the instructions given by the shipper related to the goods and the usage of the equipments[19].

V. Legal Assessment and Conclusion

Damage of the goods, especially if the goods are loaded into containers, sometimes can arise from inherent vice of the goods[20]. As it is expressed above comprehensively, taking this into consideration, "inherent vice of the goods" is counted in the list in Art. 1182 of TCC as an exception that provides to the carrier easiness to prove his non-liability.

At this point, it is important to emphasize that it is usually possible to prevent the damages risen from inherent vice of the goods by using a cargoworthy container

19 Oetker and Paschke (n20) § 499 Rn 9; Herber and Harm (n4) § 499 Rn 59 ff. For similar explanations, see also, Hoffmann (n19) 46, 47.
For a different decision given by a German Court (before the Maritime Law Reform) in which the inherent vice of the goods has been accepted as an exception for carrier's liability and which ensures if the shipper did not control the containers provided by the carrier and because of this could not detect the unseaworthiness of the container, the carrier would not be liable because of the loss or damage: *OLG Hamburg, Urteil vom 26.11.1987 (6 U 158/87 (Vorinstanz: LG Hamburg - 25 O 22/87): "... the lawsuit must be refused because in the frame of the Plaintiff's own declaration the carrier can not be liable based upon the exception in HGB 608 Abs.1 Nr.5, Abs.2 (a.F.). Plaintiff alleges that according to the 6th page of the brochure presented by the Defendant, the container which has ventilating slits on it is not suitable for carriage of the garlic inarguably. If it is accepted that this allegation is true, it means that the damage of the goods arised from the negligence of the shipper. The shipper is under the obligation of controlling the containers provided him by the carrier. If as the Plaintiff said, the container used to carry the goods is not suitable to carry the garlic because of its inherent quality (high water content), the shipper did not have to use these uncargoworthy containers and had to refuse them.*…On the other hand, in the frame of the Plaintiff's explanations, it is not possible to see existence of the carrier's contributory negligence. The Defendant provided the container which had ventilating slits by force of his obligation he undertook with the agreement. At this point, the Plaintiff could not prove the carrier why had to know this type of container was not suitable for the garlic….." (*"...Dessen Aufgabe ist es und nämlich gerade, die ihm zur Verfügung gestellten Container auf ihre Eignung zu prüfen. war - wie die Kl. behauptet- der zur Verfügung gestellte Containertyp Aufgrund der besonderen Eigenart der Ware (hoher Wassergehalt) für die Beförderung nicht geeignet, so hätte der Befracter diese Ware nicht in den Containern verstauen dürfen, sondern hätte die Container als ungeeignet zurückweisen müssen. Da der Befrachter über die Erforderliche Warenkunde verfügen muss, um die Eignung des zur Verfügung gestellten Containertyps für die Beförderung seiner Ware eurteilen können, trifft diesen ein Verschulden, wenn er die Knoblauchladung in den Containern zur Verschiffung gebracht hat. Dagegen läßt sich ein Mitverschulden des Verfracters hinscihtlich der Gestelltung der Container dem Klagervortrag nicht entnehmen. Die Bekl. hat entsprechend der von ihr übernommenen Nebenpflicht dem Befrachter übliche Container mit Ventilationsöffnungen zur Verfügung gestellt. Weshalb sie als Verfrachter hätte wissen müssen, dass dieser Containertyp für den Transport von Knoblauch ungeeignet war, hat die insoweit ebenfalls Darlegungs- und Beweispflichtige Kl. jedoch nicht dargetan…*")
The provisions in HGB §608 (a.F.) Abs.1 Nr.5 and Abs.2 set forth that the carrier will not be liable in principle if the loss or damage arises from the act or negligence of the shipper's servants and agents. For full text of this decision see, *OLG Hamburg, Urteil vom 26.11.1987 (6 U 158/87 (Vorinstanz: LG Hamburg - 25 O 22/87),* Transportrecht (1988) 238-239.
In this case, the German High Court accepted that the shipper must control the containers before he receives them or at least just before loading them, as a special form of the duty of acting like a prudent Merchant and in the concrete case the act of the shipper who did not controlled the container provided by carriers was accepted as a prominent cause of the damage and did not approved "inherent vice of the goods" in the frame of HGB §608 (a.F.) as a reason that provides to carrier easiness to prove his non-liability. In this context it must be emphasized that before leaning to the exception of "inherent vice of the goods", it must also examined whether there is a negligence attributable to the shipper or not.

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and taking some other special measures while loading the containers. Because of this, the German Legislature, taking this into consideration, has ensured a special provision for the damages caused by inherent vice of the goods. As it is stated above, the circumstances counted in the list of Art.1182 TCC and provide easiness to carrier to prove his non-liability, basically refer to the situations where the carrier has no negligence and in a similar way, both the Hague Visby Rules and German Commercial Code, accepting the damages related to inherent vice as a cirumstance of "non-liability" grounds for this reason. However, in the course of time, some important developments have made it possible to reduce or prevent the damages related to inherent vice of the goods by means of some trivial precautions. Especially for the goods sensitive to heat exchanges or sensitive to moisture, damages can be prevented substantially by using ventilated or heat – controlled containers. On the other hand, to protect this kind of goods, it is known that in practice using different equipment in containers to prevent the damages related to moisture or heat changes has become almost a tradition nowadays. In the frame of these developments, the regulation of the German Commercial Code which provides that unless the carrier proves he has taken all necessary precautions to prevent the damage, inherent vice of the goods does not constitute a reason to remove the carrier's liability, can be assessed as such a reasonable and accommodated provision with current developments. At this point, it must be emphasized especially that in the Volcafe decision of the United Kingdom Supreme Court has also accepted a very similar consequence with the principle in HGB §499, Abs.1(6). This decision, which differs from the main principles for the burden of proof of the Hague Visby Rules, and differs from the views alleged by doctrine up to this decision, states that if the carrier demands to eliminate their liability in the presence of a damage arisen from the inherent vice of the goods or in the presence of other exceptions counted in Art. IV/2 of the Hague Visby Rules, they must also prove they have no negligence[21].

In respect to Turkish law, in our opinion, although it does not contain an explicit provision, there is no hesitatation about that the carrier who undertakes the carriage of the goods which are needed to be carried under special conditions, (for example, in special containers or using special equipments), will be under the obligation to provide a sea-and cargoworthy container and the carrier also must provide other suitable equipments or take other necessary precautions in containers necessary to protect the goods. In this context, if the carriage of the goods under special conditions has become a tradition in practice and if it is possible to prevent the damage by taking some precautions, the carrier cannot allege non-liability with reference to Art. 1182/1(f) which ensures the carrier will have easiness to prove because of the damages arisen from inherent vice of the goods. Especially, if the agreement between carrier and shipper or tradition in practice required some special precautions to be taken

21 See, *Volcafe Ltd and others v. Compania Sud Americana De Vapores SA* Para 43.

by the carrier, it must especially be highlighted that under this impression, where the damage of the goods can be prevented by the carrier taking these precautions, the main reason causes the damage will be a breach of the carrier's duty of care (to provide a sea-and cargoworthy equipment); not the inherent vice of the goods. In other words, it can also be said that if a prospective loss or damage related to inherent vice of the goods is possible to be prevented with the precautions taken by carrier, it is not exactly true to mention a loss or damage "directly" arisen from inherent vice of the goods. As it is frankly understood from the next paragraph of Art. 1182, which ensures "if it is proven that the damage caused by a reason that is in charge of the carrier, the carrier cannot eliminate their liability", this article does not aim to set the carrier free of liability "directly" or "unconditionally". On the other hand, although it is probable to be understood from the letter of the Art. 1182 that the carrier can eliminate their liability based upon "presumptions about non-negligence and existence of the causation" on the ground that "inherent vice of the goods" directly and unconditionally, since here the letter and spirit of the provision are not compatible, the last paragraph of Art.1182 must be accepted, which states "if it is possible that the damage is caused by one of these reasons while the circumstances of the concrete case are taken into consideration, it will be accepted the damage has arisen for this reason" cannot be possible to be implemented where the damage related to an inherent vice of the goods is possible to be prevented with the precautions taken by the carrier.

A counter acception, which confirms the carrier can utilize the presumption of non-negligence and existence of causation, cannot comply with the main aim of this provision. In this context, it must especially be taken into consideration that Art. 1182 based upon the Hague Visby Rules Art. IV/2 which was written on a term there were no so many kinds of precautions to prevent the loss or damage for the goods which have a special character. In the frame of these explanations, this provision based upon substantially the Hague Visby Rules Art. IV/2 which was written in a period that carriage by sea was not as developed as today, and there were not so many precautions to prevent the damages related to inherent vice of the goods, must be implemented just for the "damages of inherent vice which cannot be prevented despite of the precautions taken by the carrier[22]. In this context, although the Turkish

22 These precautions become essential especially for container carriages. Taking into consideration this, a handbook which refers to all of the precautions needed to be taken in container carriages to prevent the damages caused by inherent quality of the goods has been drawn up in Germany. This book called *Container Handbuch (CHB)* and drawn by GDV (*German Gesamtverband der Versicherer*) has given place to thousands of different measures for each type of the goods. On the other side, if the inherent quality of the goods necessitates special precautions to be taken and if the goods are loaded into the container by the shipper, this time shipper must take some precautions just before the loading into the container. For example, packed seed corns and grain can be carried in standard containers. However to carry these kind of goods in standard containers, some precautions must be taken before loading into containers. While some of these precautions aim to make containers sea or cargoworthy, some other part of these precautions are related to the protection of the goods directly. For instance seeds corn or grain are advised to be loaded into dry bulk containers after a pre-drying process. Except this, to prevent the loss or damage for these kind of goods, contingence of the goods with the container door must be prevented with 4 rectangle bars. (CHB Para. 17.2.)

Commercial Code does not contain an explicit provision like HGB §499[23], "inherent vice of the goods" must not be accepted as a reason to create the presumtions of non-negligence and existence of the causation "directly" to eliminate the carrier's liability, in a similar way with the United Kingdom Supreme Court's tendency in the Volcafe case[24]. As a second point to be highlighted, it must be accepted that it is not possible to mention "a damage caused by inherent vice of the goods" in the meaning of Art.1182, if it is possible the damage can be prevented with the precautions taken by the carrier.

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So indeed, especially at container carriages loss or damage is usually in relation with the inherent quality of the goods and it is also so important to emphasize that these damages can be prevented by the additional precautions. Another example for this is semi-luxury goods like cocoa or coffee. It is known that these types of goods must be processed after the harvest and then must be storen in dry conditions or preferably must be loaded as soon as possible. Because, especially under tropical climate conditions (for example especially in rainy seasons) during a long-store term the water vapor is emitted by the goods and this causes moisture damages easily (CHB Para.17.6). In the frame of these explanations, it is so crucial to determine the damage caused by uncargoworthiness of the container; inherent vice of the goods or especially for FCL container carriages at which lthe goods are loaded into container by shipper, insufficiency of the packages or negligence of the shipper's servants at the time of stowage.

23 The German Legislator has also ensured such a reasonable exception to the non-liability regulation set forth in HGB §499, Abs.1. According to HGB §499,Abs.2 S.2, "The first sentence shall not apply if the goods were carried by a ship that was not seaworthy or not cargoworthy." Although before the Maritime Law Reform in 2013, old German Commercial Act did not contain such a provision, German Courts usually decided that the exception related to "inherent vice of the goods" could not be implemented if the ship is unseaworthy or uncargoworthy. For a German Federal Court decision which the Court decided that if instead of defective hatch cover, another defective hatch cover is used, the ship will be admitted "uncargoworthy" for the rice which is known as moisture sensitive. For the full text of the decision see, BGH, Urteil vom 8. 12. 1975 - II ZR 64/74 (Köln), † Angemessene Berücksichtigung der Interessen der künftigen Vertragspartner in AGB, Neue Juristiche Wochenschrift 1976, Heft 15, s.672: *("...Ein Schiff ist auch dann von Anfang an für die Beförderung von nässeempfindlichen Gütern ladungsuntüchtig, wenn der Schiffer anstelle fehlender Lukendeckel eine andere, jedoch unzureichende Lukenabdeckung vornimmt...").* For detailed explanations on HGB §499 Abs. 2, see also, Oetker and Paschke (n20) § 499 Rn 8; Herber and Harm (n4) §499 Rn 7; Rabe and Bahnsen (n3) §499 Rn 14.
On the other hand, as regards to the Hague Visby Rules, if the container or another equipment provided by carrier to prevent the damages of the goods is unseaworthy, it must also take into consideration that carrier may be liable under the conditions of Art. III/1 of the Rules (which ensures carrier is liable for the damages arise from unseaworthiness of the ship at the beginnging of the voyage). This also means, since the exceptions included inherent vice of the goods listed in Art. IV/2 which are just implemented for the breach of the due diligence ensured in Art. III/2, can not be alleged as an exception to carrier liability under Art. III/1 HVR. For the brief explanations of the scope of application of the exceptions in Art. IV/2 see also, fn.12.

24 Akan, 98 ff. For a assessment see also, Ogis Kafeero (n1) 755 ff: The Authors emphasizes in the correct way that :"if carrier does a proper recording of which steps he followed or what he did to take care of the goods, the negligence could be easily disapproved. Contrary to the literature opinion, the Volcafe case does not bring a challenging task for a carrier". For another explanations on Volcafe case, see also, Ogis (n2) 1867: In this context, the Author alleges that Art. III/2 of the Hague Visby Rules already ensures that the carrier has a "general" obligation of care to the goods and because of this decision held in Volcafe case did not aggravate the carrier's situation, it has just made a change on practical consequences.

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RESEARCH ARTICLE

The Legal Nature of Program Formats as Copyrightable Works in Turkish Law

Gül Büyükkılıç [*], **Halil Berk Erdoğan** [**]

Abstract

Program formats can be defined as the fundamental structures that include the characteristic features of a program, allowing different program episodes to be created by evaluating the format in a similar yet distinct manner in each episode of the program. Initially emerging in the radio field and later gaining prominence in the television industry, formats have expanded their usage to include digital platforms as well. Currently, there is a strong demand in the markets of various countries for formats that have already been created and aired in other markets. However, there is no clear legal regulation on how program formats should be protected. In the doctrine, there is often a debate about whether formats can be protected as works under Law No. 5846 on Intellectual and Artistic Works[1] (IPL). These debates center on whether formats have a degree of concreteness worthy of protection as copyrightable works and whether they bear the characteristics of their authors, and even if these conditions are met, there is no consensus on which category of works formats should be included in. This study focuses on the evaluation of program formats within the scope of the IPL criteria for being considered as works, based on Turkish legal doctrine and judicial decisions.

Keywords

Program formats, Originality, Individuality, Concretization, Copyrightable Works

1 Code of Intellectual and Artistic Works, Code Number: 5846, Official Gazette: 13.12.1951/7981.

***Corresponding Author:** Gül Büyükkılıç (Ast. Prof.) Marmara University, Faculty of Law, Department of Commercial Law, Istanbul, Turkiye. E-mail: gbuyukkilic@marmara.edu.tr, ORCID: 0000-0002-3484-7002

****Halil Berk Erdoğan (LL.M.), Istanbul Bar Association - Attorney at Law, Istanbul, Turkiye. E-mail: berk@hbe-legal.com, ORCID: 0000-0002-8268-1027

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I. Introduction

Program formats can be described as the fundamental structures that encapsulate the distinctive attributes of a program, allowing them to be filled in different uniquely tailored and implemented ways throughout each episode[1].

Although formats appear as works expressed in writing, they have a different and remarkable quality from the usual types of copyrightable works for reasons such as not being intended to be read, unlike literary works, and not being staged, unlike cinematic works. These factors contribute to their unique and attention-grabbing nature within the realm of artistic creations[2].

Program formats, which were first used in radio broadcasts in the United States of America (USA) in the 1940s, have reached a wide range of usage in the TV sector with the influence of Hollywood cinema in the 1970s. This expansion allowed program formats to establish a widespread presence in the realm of the television industry[3]. The rapid development of the internet from the 1960s and 1970s to the present day has facilitated the transition of formats into the online realm.

The game show "Jeopardy" which was first aired in the USA in 1964, can be considered as the precursor of program formats. This show has also recently been broadcast in Turkey under the name "Büyük Risk". Additionally, notable examples of well-known program formats globally include "Wheel of Fortune" (USA, 1976) aired in Turkey as "Çarkıfelek", "Family Feud" (USA, 1976) aired as "Aileler Yarışıyor", "Letters and Numbers" (France, 1982) aired as "Bir Kelime Bir İşlem," "Survivor" (Sweden, 1997) aired with the same name, "Who Wants to Be a Millionaire?" (UK, 1998) initially aired as "Kim 500 Milyar İster?" (now known as "Kim Milyoner Olmak İster?"), "Big Brother" (Netherlands, 1999) aired as "Biri Bizi Gözetliyor," "Got Talent" (USA, 2006) aired as "Yetenek Sizsiniz", and "MasterChef" (Australia, 2009) aired with the same name in Turkey.

There is no doubt that program formats are intellectual creations. However, there is no specific normative regulation on how they should be legally protected. This makes the scope and limits of protection unclear and open to interpretation. At this point, it will be instructive to determine whether formats can be legally characterized as copyrightable works. There is no consensus in the doctrine and judicial decisions as to whether formats qualify as copyrightable works. These debates are particularly focused on whether formats have acquired a degree of concreteness worthy of protection as works and whether they embody the originality[4] of their authors. Even

1 Uğur Çolak, TV Program Formatlarının Korunması (2004) 4 (3) Fikri Mülkiyet ve Rekabet Hukuku Dergisi 13.

2 Robin Meadow, 'Television Formats – The Search for Protection' (1970) 58 (5) California Law Review 1170.

3 Stefan Bechtold, 'The Fashion of TV Show Formats' (2013) 2013 (2) Michigan State Law Review 457.

4 Foreign doctrine on the subject uses the term "condition of originality" to express this condition [see for example Bechtold (n 4) 469, 472, 473; Frank L Fine, 'Case for the Federal Protection of Television Formats: Testing Limit of Expression'

if these are clarified, there is no consensus as to which category of works formats should be classified under.

This study aims to evaluate program formats in the light of Turkish legal doctrine and judicial decisions in terms of the conditions to be considered as a copyrightable work within the scope of the IPL. Under the first heading, the concept of program format[5] is explained. In the following section, the conditions for being considered as a work within the scope of the IPL are briefly discussed. Subsequent sections delve into each condition separately, providing general information about the respective condition. Furthermore, specific explanations and evaluations are provided for program formats to shed light on controversial aspects of the subject matter. The aim is to bring clarity to the discussion by examining program formats in relation to each condition and addressing the pertinent issues.

II. The Concept of Program Format

The concept of program format/format is not defined in law. It is an industry-specific term derived from the realm of media[6]. In this context, a format is typically described as a composition of elements including the main idea, storyline, theme, genre, music, technical adjustments, graphics, sequence, and production instructions[7]. The format created with these elements is applied to the relevant program to create interrelated program sections[8].

In the legal doctrine, the purpose of a format is defined as determining how a program in its draft stage will be prepared, how the program host will conduct proceedings, what type of questions will be asked of participants, where participants will be seated, under what circumstances a participant will be deemed successful or unsuccessful, which slogans, music and jingle will be used in the program, what kind of atmosphere will be created in the studio, and how viewers can actively engage with the program[9]. In this way, if the program's overall framework can be outlined and its basic rules established, then the existence of a format can be acknowledged.

Pacific Law Journal, 1985 17(1) 57, 58, 71; Neta-Li E. Gottlieb, 'Free to Air - Legal Protection for TV Program Formats' (2011) 51 IDEA: The Intellectual Property Law Review 233, 238, 266, 268]. In this study, the concepts of "individuality", "characteristic" and "particularity", which we consider to have the same content and value in terms of reflecting the condition in question, are used interchangeably with the term "originality".

5 The term "program format/format" is used to cover all genres, as there is no practical difference between radio, television, and online platforms, except for the media in which they are broadcast.

6 Marc Heinkelein and Christoph Fey, 'Der Schutz Von Fernsehformaten Im Deutschen Urheberrecht - Zur Entscheidung Des BGH: Sendeformat' (2004) 53 GRUR International 380; Katja Lantzsch, Der Internationale Fernsehformathandel: Akteure, Strategien, Strukturen, Organisationsformen (Wiesbaden 2008) 122.

7 Bechtold (n 4) 456.

8 Mustafa Ateş, Fikri Hukukta Eser (1st edn, Adalet 2007) 281; Mustafa Arıkan, Fikri Mülkiyet Hukukunda Televizyon Program Formatlarının Korunması (1st edn, On İki Levha 2012) 12; Bechtold (n 4) 457; Meadow (n 3) 1170; Tuğçe Karabağ, Fikir ve Sanat Eserleri Hukuku Açısından Televizyon Programları ve Televizyon Program Formatları (1st edn, Seçkin 2007) 49-50.

9 Çolak (n 2) 13-14.

The preparation of formats may require months of research and writing processes. This is hardly surprising, given that the formats are usually fifty to a hundred pages long and consist of written parts that involve considerable intellectual effort. On account of these characteristics, it has been observed that formats are equally deserving of protection, at least to the extent of other types of works encountered in the entertainment industry[10].

Program formats are developed in one country's market and then launched internationally for adaptation in other countries. In order to adapt these formats, licenses are granted to relevant local market players. Along with the license, a manual known as the "production bible" is provided to the licensee. Some authors refer to this guide as the "format rules book"[11]. However, it should be noted that this guide not only includes rules related to the formats but also contains valuable production-related data such as insights and lessons learned during the development stage, research findings from the audience perspective, marketing tips, shooting schedule, crew list, sample budget, and other essential information[12]. Depending on the license agreement, successful changes made by the licensee to the format may also be included in the manual[13]. In this context, it is thought that it would be more appropriate to refer to the expression "production bible" as "production manual" rather than "format rule book", as it better reflects the content of the book and its purpose[14].

Formats are created by blending elements of creative thinking, business, and marketing in a single framework. In this context, some elements may be externally imposed based on the program's genre and available technology, while others are driven by the program's target audience, desired emotions and reactions, and the logical coherence of the format. Each element used in the format contributes to its value. However, the true value of a format is derived from the combination of these elements and the natural connections that form between them[15].

Finally, under this heading, it is worth mentioning the distinction between programs and program formats. In point of fact, while formats are written works, programs based on a format are cinematographic works captured on camera. Another difference concerns the extent to which programs and program formats are subject to commercial transactions. That is to say, formats can be marketed for direct use as they are, while programs can be marketed by adapting the format text and broadcasting localized program segments[16].

10 Meadow (n 3) 1171.

11 Ünsal Dönmez and Bengi Sargın, 'Televizyon Program Format Lisans Sözleşmesi' (2021) 4(1) Ticaret ve Fikri Mülkiyet Hukuku Dergisi 71.

12 Andrea Esser, 'Format is King: Television formats and commercialization' in Karen Donders and Caroline Pauwels and Jan Loisen (eds), Private Television in Western Europe (Palgrave Macmillan, 2013) 151-152.

13 Esser (n 12) 152.

14 Halil Berk Erdoğan, Program Formatlarının İnternet Ortamında Korunması (1st edn, Seçkin 2023) 20.

15 Gottlieb (n 5) 215.

16 ibid 217.

III. The Legal Nature of Program Formats As Works Under IPL

A. The Legal Concept of a Work And The Conditions For Qualification As A Work Under IPL

The legal protection granted to an intellectual product also entails the limitation of rights of third parties. Therefore, the classification and protection of a product as a copyrightable work is only possible when certain conditions are met. In this regard, guidance is provided by Article 1/B-a of the IPL. According to the relevant provision, a work is defined as *"any kind of intellectual and artistic creations that bear the characteristic of its author and are classified as works of science and literature, music, fine arts, or cinematography."*

Based on this definition, the conditions for being considered a work under the IPL have been categorized differently in the doctrine. The majority view groups these conditions under two main headings[17]. Accordingly, for an intellectual product to be protected as a work, it must meet objective and subjective conditions. The objective condition pertains to the concretization of the intellectual product, meaning it must be concretized in a tangible form and fall within the types of works envisaged under the IPL. On the other hand, the subjective condition, originality, pertains to the work being the result of intellectual effort and bearing the individuality of its author.

Another perspective categorizes the criteria for classifying a creation as a work as follows: originating from a human creator, possessing intellectual or aesthetic content, being perceivable by third parties, demonstrating the qualities of a work in the domains of science, literature, music, fine arts, or cinematography, reflecting the individuality of its author, and exhibiting a certain level of creativity[18].

A different classification includes the conditions of concretization, being included in one of the types of works stipulated in IPL, being created as a result of an intellectual effort and activity, bearing the characteristic of its author and, where applicable to fine art, possession of aesthetic value[19].

17 Ernst Hirsch, Fikir ve Sanat Hukuku (1st edn, Ankara Ar 1948) 130; Ateş (n 8) 28; Hayri Bozgeyik, Mimaride Telif Hakları: Mimari Projeler, Mühendislik Projeleri, Mimari Eserler ve Mimari Maketler Üzerindeki Telif Hakları (1st edn, Seçkin 2019) 42; Levent Yavuz and Türkay Alıca and Fethi Merdivan, Fikir ve Sanat Eserleri Kanunu Yorumu (2nd edn, Seçkin 2014) 63; Şafak N. Erel, Türk Fikir ve Sanat Eserleri Hukuku (1st edn, Yetkin 2009) 52; Özge Öncü, Fikir ve Sanat Eserleri Hukukunda İktibas Serbestisi ve Sınırları (1st edn, Yetkin 2010) 112; Şafak Parlak Börü Fotoğraflar Üzerindeki Haklar (1st edn, Turhan 2013) 181; Ramazan Uslu, Türk Fikir ve Sanat Hukuku'nda Eser Kavramı (1st edn, Seçkin 2003) 34; Ramazan Yılmaz Yazıcıoğlu, Fikri Mülkiyet Hukukundan Kaynaklanan Suçlar (1st edn, On İki Levha 2009) 57; Yalçın Tosun, Sinema Eserleri ve Eser Sahibinin Hakları (2nd edn, Onikilevha 2013) 30; Indeed, in this direction see: Supreme Court Assembly of Civil Chambers 2003/4-260, 02.04.2003; 11. Civil Chamber of Turkish Court of Appeal 2008/7336, 13.11.2009 and 2007/4708, 15.05.2008 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

18 Fırat Öztan, Fikir ve Sanat Eserleri Hukuku (1st edn, Turhan 2008) 82.

19 Ünal Tekinalp, Fikri Mülkiyet Hukuku, (5th edn, Vedat 2012) 103; Savaş Bozbel, Fikri Mülkiyet Hukuku (1st edn, On İki Levha 2015) 27; Salih Polater, Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları (1st edn, On İki Levha, 2021) 32.

According to the view we adopt, there are basically three conditions to be fulfilled in order for a creation to be considered a work within the scope of the IPL[20]. These are:

- Going beyond an abstract idea and being concretized in the external world in a way that can be perceived by third parties (Objective condition/ Condition of concretization[21])
- Being created as a result of an intellectual effort and activity and bearing the characteristics of its author (Subjective Condition / Intellectual effort or activity and condition of individuality)
- Being included in one of the types of works (science-literature, music, fine art, or cinematography) stipulated in Article 1/B-a of the Code (Condition of form)

In addition to these three conditions, for fine artworks, it is also necessary to fulfil the condition of having aesthetic value[22].

It is necessary and sufficient to meet the aforementioned conditions. In addition, there is no requirement for registration as in the case of trademarks, patents, or designs. The work need not be distinctive and objectively new since novelty for the author, in other words subjective novelty, is sufficient[23]. The quantity or quality of the work, its recognition or economic value beyond a certain region, the labor, and the expense incurred are not taken into account in determining the quality of the work.

B. Concretization (Objective Condition)

In Turkish law, the first condition for an intellectual product to be accepted as a work and protected under copyright law is that it must be perceptibly embodied in the outside world[24]. In other words, intellectual products that remain at the abstract idea stage will not be protected as works, no matter how creative they are. This point is described in the doctrine as follows: "*A painter cannot benefit from copyright protection unless he picks up a brush and paints a picture, and a writer cannot benefit from copyright protection unless he writes a novel*."[25].

20 Tekinalp (n 19) 97; Temel Nal and Cahit Suluk and Rauf Temel, Fikri Mülkiyet Hukuku (6th edn, Seçkin 2022) 38.

21 In the doctrine, this condition is referred to as "condition of fixation" or "condition of concretization".[See Bechtold (n 4) 466-467; Fine (n 5) 57 dn. 3, 65 dn. 71; Gottlieb (n 5) 233, 238; Meadow (n 3) 1173, 1175, 1189] In this study, the term "condition of concretization" is preferred to ensure unity of concept.

22 Since there is no doubt regarding the fact that the program formats, which are the subject of this study, cannot be considered as works of fine art, the requirement of having aesthetic value has not been examined.

23 Regarding the aspects that will not be taken into account for being considered as a work, see Bozbel (n 18) 38-39; Nal and Suluk and Temel (n 20) 44-46.

24 Tekinalp (n 19) 108; Nuşin Ayiter, Hukukta Fikir ve Sanat Ürünleri (1st edn, 1981) 41; Ateş (n 8) 32; Ernst Hirsch, 'Memleketimizde Mer'i olan Telif Hakkı Kanununun Tahlili' (1940) 6 (2-3) İstanbul Üniversitesi Hukuk Fakültesi Dergisi 367, 399.

25 Nal and Suluk and Temel (n 20) 48.

In the IPL, the principle that the ideas underlying the work will not be protected is explicitly accepted only in respect of computer programs[26]. In contrast, there is no normative basis applicable to all types of works. However, as per Article 90/5 of the Constitution, namely, "*International treaties duly put into force have the force of law"*, the provisions of the treaties to which Turkey is a party fill this gap. Indeed, Article 9/2 of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)[27] states that "*The protection of intellectual property rights covers the expression of ideas, not ideas, methods, principles of application or mathematical concepts.*" Again, the Berne Convention for the Protection of Literary and Artistic Works of 1886[28] adopted the principle that abstract ideas shall not be protected and explicitly stipulated that daily news or various events that are merely press reports cannot be protected as works (Article 2/8)[29].

The fact that abstract ideas are not protected is also frequently stated in judicial decisions on the subject. In fact, the Turkish Court of Cassation's General Assembly of Civil Chambers emphasized the non-protection of *"(...) unembodied abstract ideas, themes, research subjects or methods, anonymized words, formulas (...)"* within the scope of intellectual property law[30]. In another decision, it was clearly stated that abstract designs can be expressed differently by different individuals, and therefore, they cannot be protected under copyright law[31].

The condition of concretization, which is one of the elements for benefiting from copyright protection under the IPL, pertains to the existence of a work[32]. The identification of abstract ideas does not require their acceptance as works. At this point, it is worth

26 Last sentence of Article 2 of the IPL is as follows*: "Ideas and principles on which any element of a computer program is based, including those on which its interfaces are based, are not deemed works."*

27 Agreement on Trade-Related Aspects of Intellectual Property Rights [short form: TRIPS Agreement], Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (April 15, 1994), 33 I.L.M. 81, 1197.

28 The Berne Convention for the Protection of Literary and Artistic Works, dated 1886, is the first international treaty in the field of copyright and related rights. This treaty establishes minimum standards of protection for literary and artistic works, aiming to ensure effective and harmonized protection of the rights of authors at national and international levels. Turkey, through Law No. 4117 dated 07.07.1995, has adopted the 1979 Paris Act of the Berne Convention (see The Decision of the Council of Ministers, numbered 2003/6170) (available at, <https://lawcommission.gov.np/en/wp-content/uploads/2021/01/Berne-Convention-for-the-Protection-of-Literary-and-Artistic-Works.pdf> last accessed 18.06.2023).

29 Paul Goldstein and P. Bernt Hugenholtz, International Copyright: Principles Law and Practice (4th edn, Oxford University Press 2019) 193.

30 Supreme Court Assembly of Civil Chambers E. 2017/7, 20.02.2020 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

31 Indeed, in this direction see: 11. Civil Chamber of Turkish Court of Appeal 2012/11315, 12.03.2014 *"(...) as it is a well-known fact that abstract ideas cannot be protected as works; the construction of a dam and regulator within a specific elevation range for a river, the use of 4 pipes in this context, and fundamental choices such as turbine type being mere technical options consisting of abstract ideas; and furthermore, since the project has not been expressed and embodied in a written form, which can be protected under the IPL as a tangible expression in the form of text and since there is no evidence of quotation or unfair exploitation in the specific case it has been decided to dismiss the case"*; Eleventh Civil Department of the Supreme Court 2015/2356, 21.1.2016; 11th Civil Department of the Supreme Court 2007/7226, 07.07.2008; 11th Civil Department of the Supreme Court 2005/14088, 29.01.2007 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023)

32 Istanbul 4th Civil Court of Intellectual and Industrial Property Rights, 2021/260, 21.04.2022 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023).

mentioning how concretization can be achieved. The expression of a work as a "product" falling under one of the categories in Article 1/B-a of the IPL basically indicates that the requirement of concretization is sought. However, there is no provision on the circumstances in which the intellectual product is considered to be concretized[33].

In order for an intellectual product to be accepted as a work, it is considered necessary and sufficient that it can be perceived directly by at least one of the five senses or with the help of a technical device such as a media player, and it is not required to be recorded on a technical device[34]. In other words, the intellectual product need not necessarily be embodied in an object. What is important is that it can be perceived objectively by third parties. On the other hand, the condition of concretization should not be interpreted as the completion of the work. An intellectual product at the draft stage may also be protected under copyright law, provided that the objectivity requirement is met.

There is no consensus in the doctrine as to whether program formats satisfy the element of concretization. Indeed, according to one view, the general plan contained in program formats is highly abstract. These texts describe in general terms how the program will be structured, and even if these plans or drafts are "the product of a high level of intellectual effort" and are physically determined, they cannot escape from being "abstract ideas"[35].

On the other hand, a different opinion argues that it would not be appropriate to disregard a TV program format, which has been determined in writing with all its details, as a work on the grounds that it is not sufficiently embodied, and that it is necessary to make a separate evaluation in terms of subjective and objective conditions[36].

Another view is that some program formats occupy at least a middle ground, positioned between the abstract idea and the finished concrete product[37]. This is on the grounds that formats encompass not only guiding fundamental elements for producing program segments but also recurring and characteristic-defining content elements within individual segments.

A similar view considers that they are concretized at the required level because they are expressed in a systematic manner that forms the general framework of the ideas that make up the format, and therefore they can be considered as works[38].

33 In the Berne Convention, the requirement for the concretization of an idea on a tangible medium is left to the discretion of the member countries within their own legal frameworks. Therefore, member countries are free to determine whether the fixation requirement is a constitutive element of the definition of a work (Article 2/2).

34 Nal and Suluk and Temel (n 20) 44.

35 Çolak (n 2) 26.

36 Tosun (n. 17) 190.

37 Arıkan (n 8) 36.

38 Ateş, (n 8) 282.

A further perspective holds that in order for a format to be concretized, it should take the form of a text capable of evoking concrete aspects related to the program in the reader's mind. Within this context, it is emphasized that the inclusion of elements representing the program's unique qualities and demonstrable features (such as stage sets) in the format can effectively render it sufficiently concrete[39].

A different view argues that in order for the format to be preservable, it is necessary to specify in the format the framework of an ongoing series of events, the behavior of the main and side characters (such as presenters, guests, contestants, etc.), the means by which the story is to be presented, and a gradual progression in the format should be felt[40].

In the judicial decisions on the subject, it is commonly concluded that the format in question does not qualify as a work on the grounds that it does not go beyond abstract thought rather than its concretization.

Accordingly, the Supreme Court approved the decision of the Ankara Regional Court of Justice, 20th Civil Chamber, which held that the TV game show format titled "Eldeki Kuş mu? Teldeki Kuş mu?" (later renamed as "Cevap Soruda") cannot be protected due to its abstract nature[41]. In another ruling[42], the court determined that *"(...) a television game show involving the screening and promotion of various contestants' short films and their evaluation by a jury is considered to be of "..." nature, rather than "..." and abstract ideas are not eligible for copyright protection and do not give rise to authorship, non-original abstract designs of this nature can be expressed in different forms and interpretations by anyone* (...)". In a different dispute where the artistic nature of the TV game show "Şampiyon Taraftar" was examined, the court ruled in a similarly negative manner[43].

In a different decision, the reason why program formats fail to provide the element of fixation was explained as follows: *"Program formats are generally documented as written texts and often notarized for ease of proof. In these types of texts, the outlines of the TV program are usually abstract, and elements such as how the program will be presented, what the rules of the contest are, and stage design are included. The program plan outlined in these texts is highly abstract. It describes the program's execution in very general terms. Therefore, even though these program plans or drafts may be the result of significant intellectual effort and physically documented, they cannot escape being 'abstract ideas'."*[44]

39 Arıkan (n 8) 38-39.

40 Fine (n 5) 58.

41 11. Civil Chamber of Turkish Court of Appeal 2018/2799, 10.06.2019 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

42 11. Civil Chamber of Turkish Court of Appeal 2015/2356, 21.01.2016 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

43 11. Civil Chamber of Turkish Court of Appeal 2005/11112, 20.11.2006 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

44 Istanbul 4. Civil Court of Intellectual and Industrial Property Rights, 2017/199, 29.01.2020 (available at, <https://www.

On the other hand, some decisions are partially instructive as to the circumstances in which program formats will satisfy the requirement of concretization. In a particular decision, the court stated that a format - in addition to other requirements - can benefit from protection if it is *"...documented as a written text and repeatedly fixed in a tangible form."* It ruled that, based on its originality and specificity, a format could be considered a scientific or literary work within the meaning of Article 2 of the IPL[45].

Similarly, in another decision[46], it was stated that *"...in the specific case, the format relied upon by the plaintiff essentially pertains to a method, a business process, or a similar procedure. There is no written format document created by the plaintiff. Therefore, the plaintiff cannot make a claim for authorship based on the TV program format..."* In numerous parallel decisions, the term "format text" has been used[47]. Therefore, in terms of the perceivability of formats by third parties, the requirement of being documented in written form is necessary.

In light of these explanations, it is considered that it would be *contra bona fide* to categorize program formats as abstract ideas without subjecting them to any evaluation. Formats that are sketched in general terms, that are in the nature of an abstract idea or a description of a method, a method of doing business or a similar procedure should not benefit from copyright protection. However, formats that contain elements that are original and reflect the creative activity of the author should be eligible for recognition as works, provided that they fulfil the other requirements.

In terms of the requirement of concretization, since the format consists of a written text by nature, it should be deemed necessary and sufficient to be determined in writing, in line with the judicial decisions. As stated above, in cases where the format is the subject of a license agreement, the format rule book/guide, which is given to the licensee producer and contains detailed elements, features and rules of the format, is the practical manifestation of the requirement of concretization in the form of written text. The important thing is that the format can be replicated in the future with the same content. In this framework, the format text does not necessarily have to be recorded in physical media, but the digital recording should also meet the requirement of concretization. To do otherwise would mean raising the threshold for concretization and thus narrowing the scope of copyright protection, for which there is no justification.

lexpera.com.tr> last accessed 18.06.2023) (Although the decision was overturned by the court of appeal (Istanbul 16th Regional Court of Justice 2020/2164, 29.12.2022), in the examination of the overturning decision, the reference made to the relevant section of the decision remains valid, as the grounds for overturning were based on an internal inconsistency regarding the ownership of the format.)

45 Istanbul 1. Civil Court of Intellectual and Industrial Property Rights, 2017/12, 26.11.2019 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023).

46 Istanbul 1. Civil Court of Intellectual and Industrial Property Rights, 2017/144, 26.12.2019 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023).

47 11. Civil Chamber of Turkish Court of Appeal 2015/7276, 29.03.2016 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

It should also be noted that, although there is no obligation to do so, formats are often the subject of a license agreement, and in this case - as mentioned above - a very detailed set of rules, referred to as a "format rule book/guide", is delivered to the licensee producer. In the production manual, the detailed elements of the program, how the events in the format will develop and evolve as the stages progress, how the characters will behave, how the audience will be made to feel the emotions and thoughts that are intended to be created in the audience, slogans, decorations, music and lighting will make the format concrete enough. The view that a program format that has been determined in writing with all these details cannot be considered a work on the grounds that it is not sufficiently embodied will not be accurate.

C. Intellectual Effort or Activity and Individuality (Subjective Condition)

Intellectual products, which are based on unique ideas that are associated with the outside world in their own distinctive form, are subjected to an inspection, also referred to as the "subjective condition", as to whether they bear the individuality of their author and whether they have been created as a result of an intellectual effort or activity[48]. Although this condition is not explicitly stated in the definition of a work in Article 1/B-a of the IPL, the types of works included in the Law inherently contain the elements of individuality and intellectual effort of the author[49].

As will be explained in detail below, in the doctrine and judicial decisions, whether the program formats satisfy the subjective requirement is evaluated in terms of the individuality requirement. Therefore, under this heading, general explanations regarding the condition of being created as a result of an intellectual effort or activity are sufficient, and detailed examinations and evaluations are made within the framework of the element of individuality.

What is meant by the condition of being created as a result of an intellectual effort or activity is that only works created by the creative power of human intelligence can be considered as works within the scope of the IPL[50]. Pursuant to this condition,

48 Ateş, (n 8) 75; Ayiter (n 24) 44; Duygun Yarsuvat, Türk Hukukunda Eser Sahibi ve Hakları (2nd edn, Güryay 1984) 53; Tekinalp (n 19) 104; Tosun (n 17) 35-37; Nal and Suluk and Temel (n 20) 43.

49 The Berne Convention does not include any provisions regarding the requirement for a work to possess the "individuality of its author", "aesthetic value", "quality" or "intellectual creativity", or to be deemed "original". The power to make regulations in this regard has been left to the discretion of the member countries of the Union. The question of whether it is necessary to include concepts such as "intellectual effort or activity", "individuality of its author" or "originality" in the definition of a work was discussed during the Brussels amendment of the Berne Convention. Within these discussions, one view put forth was that the concept of "product" in the definition of a work alone is insufficient in determining the existence of a work, and therefore, this definition would potentially encompass all kinds of products for literary and artistic protection. Consequently, it would be appropriate to include such elements within the definition of a work. However, it was ultimately accepted during the discussions that the terms "literary and artistic work" inherently encompass the elements of "intellectual effort or activity" and "individuality of its author" by their nature, and thus there is no need to include such concepts in the definition [Eva Marie König, "Der Werkbegriff in Europa Eine Rechtsvergleichende Untersuchung des Britischen, Französischen und Deutschen Urheberrechts," (1st edn, Mohr Siebeck, 2015) 12].

50 Hirsch (n 24) 380; *"A result produced by a living organism other than a human; such as microorganisms, or nature itself, for example the fairy chimneys formed over time in the Cappadocia region, cannot be considered as a work of art because*

which is also called "*mental productivity*", products created by ordinary abilities common to everyone, or any result produced by animals[51] or as a result of natural events, will not qualify as a work[52].

In order to fulfil the subjective requirement, mental productivity is not enough, the intellectual product must also bear the author's individuality/characteristics. However, there is no consensus in the doctrine on the definition of the concept thereof[53].

According to one view, for the existence of individuality, there must be a creative activity in the intellectual product and the author's characteristic must be reflected in the work in some way. Hence, it is not possible to mention individuality in a work that can be produced by anyone[54].

A different view argues that individuality manifests itself in expression (style) and that style, being individual and subjective, reflects the creative power of its author. According to this view, style is found not only in written works, but in all works of thought and art. [55]

Another opinion states that the particularity of works is more or less identifiable, and that the highest level of particularity is when the author can be identified at the moment of contact with the work, but that most works do not have this level of particularity[56].

As to an alternative perspective, in the determination of particularity, a single criterion valid for all types of works cannot be given, and a different criterion of particularity should be determined for each type of work. In this framework, sometimes a colour or a style of shaping the intellectual product, sometimes the choice and arrangement of words can be decisive[57].

A similar opinion posits that the notion of uniqueness can be equated with "originality" and "the author's individuality" and suggests that the assessment of whether a work embodies the author's individuality necessitates an examination of

it is not an intellectual product." see Arıkan (n 8) 57.

51 Hirsch (n 24) 380; Ayiter (n 23) 43-44.

52 *"The subject matter of intellectual property is the products that emerge as a result of the intellectual effort and endeavors of human beings utilizing their power of thought. Thinking is a characteristic unique to humans. Thinking or mental effort involves the process of mentally processing certain events, reasoning, or solving a problem using various symbols, images, and concepts."* [Tekinalp (n 19) 32]; *"Human beings produce intellectual creations due to their capacity for thinking and thought."* [Yarsuvat (n 47) 2]; *"The creation of an intellectual and artistic work has been described as perhaps the most mysterious phenomenon in the cultural life of humanity, often relying on the unpredictable inspirations of the human mind. Therefore, it is not possible for soulless entities such as computers, machines, and the like to produce works of art."* [Mustafa Ateş, "Fikri Hukukta Eser Sahipliği" (1st edn, Adalet 2012) 33]; *"In order for a work to fulfill the requirement of carrying the characteristic of its creator, it must be created by a human being."* [Polater (n 19) 87-88]

53 Ateş (n 8) 51.

54 Ernst Hirsch, Hukuki Bakımdan Fikri Say Cilt 2: Fikri Haklar (1st edn, İstanbul Üniversitesi 1943) 12, 131.

55 Tekinalp (n 19) 105-106.

56 Ayiter (n 24) 43.

57 Ateş (n 8) 75.

the concepts of "idea" and "form." In this regard, an idea is viewed as a product of exploring the metaphysical realm. Shape, on the other hand, is generally related to appearance[58]. The proponents of this view argue that these two concepts are confused in some works, that in works of fine art the specialty usually lies in appearance, while in works of science and literature it is seen more in the presentation of the idea, and therefore originality should be evaluated in different ways for each type of work[59].

In our opinion, individuality can be summarized as the ability of the creator to reflect his/her own intellectual activities and style on the intellectual product (according to the nature of the product) in different layers such as the way of expression, word choice, style of expression, camera angle, colour choice, brush choice, note arrangement. In this framework, it is not possible to determine a single criterion valid for all types of work in the evaluation of this condition and a separate evaluation should be made for each type of work, taking into account its own characteristics, the existence of a spirituality specific to the author of the intellectual product and the author's independent field of action.

Regarding the evaluation of formats in terms of subjective condition, it is seen that a distinction is made in the doctrine in terms of fictional formats and non-fictional formats[60]. According to this distinction, in fiction-based formats, the biographical and psychological profiles of the characters, the dynamics of the relationships between the characters, the behavioural patterns of the characters, the different types of characters, the texture of the program (which can be summarized as whether it will look flashy, simple, natural or mysterious) and the way the story is presented can be clearly determined[61]. On the other hand, non-fiction, reality-based program formats do not include such detailed elements, making it more difficult to determine whether the creator's touch is present in the format. In this type of format, there is usually a presenter, not characters, and the same theme is repeated in the program content[62]. Therefore, it should be accepted that a format of this nature does not carry the subjective element.

In the judicial decisions on the subject, although the distinction between fictional and non-fictional is not explicitly mentioned, the focus is on whether the program formats contain detailed explanations that differentiate them from similar productions in the broadcasting sector. Yet, it is often concluded that the program format must contain detailed explanations in order to be considered to bear the characteristic of the author[63].

58 Yarsuvat (n 48) 53.

59 ibid 53.

60 Fine (n 5) 68-72.

61 ibid 68-69.

62 ibid 70.

63 11. Civil Chamber of Turkish Court of Appeal 2015/10650, 09.05.2016 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

In a recent case, a program was found by a court decision to lack specific details essential for copyright protection due to its incomplete format and lack of originality, leading to the conclusion that it didn't possess copyrighted characteristics[64]. In a similar case, the court ruled that common elements in TV competition shows, such as contestants and prize awards, do not embody the plaintiff's distinctiveness, thereby excluding them from copyright consideration[65].

In a distinct case, the court clarified that a format primarily pertains to structure and rules, regardless of meticulous detailing, and retains its external nature. The court highlighted that originality necessitates the incorporation of the author's distinctive traits, defining this threshold as uniqueness not just in expression but also in content, albeit without imposing excessively high standards[66].

In a different case, the court found a format based on a 14-week program with assigned film subjects, budget, short film production, TV airing, and SMS awards to lack the required uniqueness and originality for copyright[67]. Likewise, in another case, a format involving contestants and a "storage room" segment was denied protection due to its lack of specificity[68].

According to our view, the fictional-non-fictional distinction in the doctrine and the evaluation of whether the judicial decisions contain detailed explanations are parallel to each other. In this framework, it is essential to acknowledge that a fictional program format, which is adequately specified and distinct from similar programs in the media industry, should be able to satisfy the subjective criterion. By contrast, non-fictional formats containing non-original content, such as the hosting of guests, conducting interviews, visiting different countries, or presenting specific news, are deemed inadequate to meet the criterion of originality. Adopting a divergent perspective would lead to the monopolization of elements that are present in every program, such as filming techniques, sound effects, the narration style of the presenter, staging devices and visual effects, and would expand the scope of copyright protection in a way that would unduly limit freedom of expression.

64 İstanbul 4th Civil Court of Intellectual and Industrial Property Rights, 2021/260, 21.4.2022 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023.

65 İstanbul 1st Civil Court of Intellectual and Industrial Property Rights, 2017/144, 26.12.2019 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023.

66 Istanbul 4th Civil Court of Intellectual and Industrial Property Rights, 2017/199, 29.01.2020 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023). (Also see n 42)

67 11. Civil Chamber of Turkish Court of Appeal 2016/8864, 12.03.2018 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

68 Istanbul 16th Civil Court of Intellectual and Industrial Property Rights, 2017/2556, 30.10.2019 (available at, <https://legalbank.net> last accessed 18.06.2023 (Approved with 11th Civil Department of the Supreme Court of Appeals' decision 2019/5193, 29.06.2020)

D. Falling Under One of the Categories Specified in Article 1/B-A Of IPL (Condition of Form)

In order for an intellectual creation to be considered a work, in addition to the objective and subjective criteria, it must also fall under one of the categories specified in Article 1/B-a of the IPL, which include scientific and literary or musical work or work of fine arts or cinematographic work[69].

The categories of works introduced by the IPL are subject to the principle of *numerus clausus* and intellectual products that cannot be included in one of these categories cannot be considered as works. However, the types of works listed under these four categories are listed by way of example and are not subject to the principle of *numerus clausus*[70]. For example, although the term "series of interrelated moving images" is used in Article 5 of the IPL, only "cinematographic works" are listed and the term "film" is used in the text and title of the article. The term "film" is not a legal term and covers a wide range of creations besides motion pictures, such as documentaries, TV series, commercials, cartoons, etc.[71] Therefore, although not listed in the Article, intellectual products that are similar to the works included in the scope of the provision - provided that other conditions are also met - may also be considered as works.

Although the types of works listed under the categories are exemplary, the classification of works into the four established types poses challenges in determining the legal status of new types of intellectual creations, such as program formats. This situation has resulted in the emergence of certain methods and justifications in legal doctrine and court rulings, where the underlying basis for their determination may lack clarity, pertaining to the legal attributes of these novel forms of intellectual creations. Indeed, with the emergence of television and later the widespread use of the internet, the number of platforms on which cinematic works are transmitted (or streamed) and made available to the public has increased significantly. As a result, there has been a diversification in the types of cinematic creations. In the face of this evolving landscape of cinematic creations, the existing legal definitions have proven inadequate and insufficient in capturing the full scope of these new forms of expression[72].

The question of whether program formats, which form the core of programs that are considered as cinematic works, possess the status of works extends beyond visual and auditory works and requires assessment from other perspectives as well. In this regard,

69 Ayiter (n 24) 45; Tekinalp (n 19) 109; Ateş, (n 8) 35-38; Yarsuvat (n 48) 55; Nal and Suluk and Temel (n 20) 39; Polater (n 19) 39.

70 Ayiter (n 24) 45; Tekinalp (n 19) 114; Ateş, (n 8) 35-38; Yarsuvat (n 48) 54; Nal and Suluk and Temel (n 20) 39; Polater (n 19) 39.

71 Tekinalp (n 19) 126-127; Nal and Suluk and Temel (n 20) 39.

72 Tosun (n 17) 52.

in order to determine the qualification of a format as a work, which is recognized to meet both objective and subjective criteria, it becomes crucial to identify the specific category of works to which the formats belong. This determination needs to be made with utmost precision, as the assigned category will significantly impact the ownership of these formats, given their inherent nature. Debates primarily revolve around whether formats should be classified as cinematic works or as scientific and literary works.

The quality of the program formats that constitute the building blocks of programs that are considered to be cinematic works is an issue that should be evaluated not only in terms of audio-visual works, but also in terms of other types of works. At this point, in order for a format that is deemed to meet the objective and subjective conditions to be considered a work, it is necessary to determine which category of work the formats fall into. It is important that this determination is made with precision. This is because the identified category of works will also create major *de facto* differences in terms of copyright due to the nature of the formats. The debate centers on whether the formats are works of cinema or works of science and literature.

The minority view in the doctrine argues that program formats should be considered as a work similar to the cinematographic works regulated under Article 5 of the IPL. This view argues that program formats have a double character and can be protected under Article 2 as well[73]. According to this view, *"(...) television programs are considered as works similar to cinematographic works as stipulated in Article 5 of the IPL. In some decisions of the Court of Cassation, it can be observed that television program formats are also regarded as works similar to cinematographic works as defined in Article 5. Therefore, it is also possible to acknowledge program formats as works similar to cinematographic works, as expressed in the decisions of the Court of Cassation."*

The opposing view, on the other hand, relies on the definition of cinematographic works. In fact, Article 5 of the IPL, titled "Cinematographic Works," defines them as *"films of an artistic, scientific, educational or technical nature or films recording daily events or movies, that consist of a series of related moving images with or without sound and which, regardless of the material in which they are fixed, can be shown by the use of electronic or mechanical or similar devices."* Formats, on the other hand, are written works and cannot manifest themselves as a series of moving images. Therefore, they cannot possess the nature of cinematographic works, and there is no need for further examination on this matter[74].

The prevailing view in the doctrine is that program formats should be considered within the scope of "scientific and literary works." In fact, program formats are described as an "unconventional form of literary works"[75].

73 Arıkan (n 8) 40-42.

74 Tosun (n 17) 191.

75 Meadow (n 3) 1170.

According to one view, formats are works of science and literature, provided that they also meet the other conditions, since they contain an intellectual effort and have a fiction and a plan[76].

Another view compares program formats to zoning plans in terms of their function, and states that it is not a proper approach for program formats not to be accepted as works when architectural, urban planning and design projects, and even sketches are protected as works of science and literature. According to this view, program formats should also be evaluated within the scope of works of science and literature, since works "expressed in any form of language and writing" are considered as literary works under Art. 2 of the IPL[77].

On the other hand, a different opinion asserts that due to their independent existence from the actual program, program formats cannot be considered as cinematographic works. Instead, they suggest that within the scope of different types of works, program formats align more closely with scientific and literary works. This viewpoint also emphasizes that program formats lack literary characteristics[78].

There is no uniformity in the judiciary as to which category of works formats should come under.

In a significant Supreme Court decision[79], the "Dart Show" competition format was deemed akin to cinematographic works due to unauthorized use, while another ruling[80] emphasized that TV program formats, including competitions, should be acknowledged and safeguarded as works under Law No. 5846.

However, in accordance with the prevailing doctrinal stance, the majority of decisions hold that formats should fall under the purview of "scientific-literary" works. In a relevant case concerning a cartoon format, it was expressly stated that if characters and typification fulfil the requisite criteria, they may be recognized as works, further confirming the classification of the format itself as a scientific-literary work[81].

In a decision pertaining to the "Kim Milyoner Olmak İster?" TV show format, an adaptation of "Who Wants to Be a Millionaire?" in Turkey, the court ruled that the extensive 249-page format text comprehensively outlines the show's entirety,

76 Tekinalp (n 19) 110.

77 Ateş (n 8) 282-283.

78 Hamdi Yasaman, Fikri ve Sınai Mülkiyet Hukuku Fikir ve Sanat Eserleri Endüstriyel Tasarımlar Patentler ile ilgili Makaleler Hukuki Mütalaalar Bilirkişi Raporları (1st edn, Vedat 2012) 162.

79 11. Civil Chamber of Turkish Court of Appeal 2008/5996, 03.11.2008 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023.

80 11. Civil Chamber of Turkish Court of Appeal 2004/6612, 05.04.2005 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023.

81 11. Civil Chamber of Turkish Court of Appeal 2015/13096, 15.05.2017 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023).

encompassing elements like contestant-host interaction, commercial breaks, filming techniques, and visual presentation of questions. This detailed document was recognized as a work falling within the scope of science and literature under Article 2[82].

In a different ruling aligned with this perspective, the court examined the conditions for TV program formats to be classified as works of science and literature. The court outlined that TV program formats can qualify as works if they are expressed in writing, and are reproducible, original, and distinct. However, in the case under consideration, the plaintiff's format described a method without a written document for validation, precluding its recognition as a work. Generalized elements shared by many TV shows, like contestants and prizes, lack the plaintiff's uniqueness and are excluded from consideration[83].

Based on this information, in our opinion, it is evident that programs should be protected under Article 5 of the IPL. As a matter of fact, the term "film" is defined in Article 5 and as stated above, this term covers many creations such as documentaries, TV series, advertisements, cartoons and similar creations in addition to motion pictures. However, it is a mistake to extend this approach to programs to include formats. In other words, it is not possible to accept formats that are embodied in a written form as cinematographic works. This is because in order for a work to be considered a cinematographic work or a work similar to a cinematographic work, it must first be a "series of interrelated moving images".[84]. Since program formats in the form of written text do not meet this requirement, they should be deemed not to be cinematic works without further examination.

According to Article 2 of the IPL, the fundamental characteristic of works that fall under the category of scientific and literary works is that they are "expressed in language". The protection of these products as copyrighted works does not hinge upon the significance of their content, the subjects they address, or their scientific or literary value. Any form of expression of ideas and artistic creations in language, regardless of their literary, scientific, social, political, or religious nature, is eligible for copyright protection as long as it possesses originality and attains a certain level of concreteness[85].

82 11. Civil Chamber of Turkish Court of Appeal 2015/7276, 29.03.2016 (available at, <https://www.kazanci.com.tr> last accessed 18.06.2023). Indeed, in this direction see: 11. Civil Chamber of Turkish Court of Appeal 2011/12280, 10.06.2013 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023).

83 11. Civil Chamber of Turkish Court of Appeal 2011/8810, 06.06.2013 (available at, <https://www.lexpera.com.tr> last accessed 18.06.2023).

84 The umbrella term "cinematic works" as stated in the IPL may potentially give rise to debates concerning the legal classification of works such as television series and even music videos, which fall within the scope of cinematographic works. It is arguable that the term may prove inadequate when considering emerging forms of intellectual creations resulting from advancing technologies. In light of this, it could be proposed that cinematographic works, including cinema works, be addressed under the encompassing heading of "audiovisual works." This inclusive definition would serve to minimize disputes regarding the appropriate categorization of new types of intellectual creations brought forth by technological advancements.

85 Ateş, (n 8) 123; Tekinalp (n 19) 114; Nal and Suluk and Temel (n 20) 56; Yarsuvat (n 48) 55-60.

Program formats that are not in the nature of an explanation of a method, nor of a method of doing business or a similar procedure, and that are fixed and reproducible in written form should benefit from copyright protection as works of science and literature, provided that they also meet other conditions.

IV. Conclusion

Program formats constitute the building blocks of programs, one of the most important revenue items of the media sector, however there is no consensus in the doctrine and judicial decisions as to whether formats qualify as works within the scope of the IPL. These debates are particularly focused on whether the formats have acquired a degree of concreteness worthy of protection as works and whether they bear the characteristics of their authors. Even if these conditions are met, differing opinions exist regarding the specific category to which program formats should be classified.

For a work to be recognized as a work under intellectual property law, certain conditions must be met. The first and most fundamental of these is that it is only ideas that cannot be protected and that protection can only be enjoyed if the intellectual product exceeds a certain threshold of concretization. In the doctrine, it is argued that formats can in no case be more than an abstract idea, and the majority view is that it would not be correct to disregard the format as a work on the grounds that it is not sufficiently concretized and that a separate evaluation should be made within the framework of the circumstances of the concrete case.

In our opinion, accepting that program formats are in the nature of abstract thought without any evaluation would be unfair within the framework of the circumstances of the concrete case. In this framework, formats that do not go beyond the transcription of an abstract idea, that are sketched, that are a description of an abstract idea or a method, method of doing business, or a similar procedure should not be protected under the IPL. On the other hand, it is considered that formats which are original in terms of the elements they contain, and which reflect the intellectual effort or activity of their author - provided that other conditions are also met - are not an obstacle to their acceptance as works.

Regarding the condition of concretization, it should be deemed necessary and sufficient that the format is determined in writing. In cases where the format is the subject of a license agreement, the “format rule book” delivered to the licensee producer is also a practical manifestation of this concretization in the form of a written text. The important point is that the format should be reproducible in the same content and that the format text should not necessarily be recorded in physical or digital form. Any contrary assumption would raise the threshold of concretization and consequently restrict the scope of copyright protection, without a justifiable basis.

An additional essential requirement for a concrete manifestation of an intellectual product to be deemed a work is the embodiment of its author's originality. Undoubtedly, a program format may attain the status of a work only when it harmoniously combines not only mundane elements but also additional elements that exemplify the creative intellect of its proprietor.

A further stipulation for an embodied intellectual product to attain the status of a work is contingent upon it carrying the distinct characteristics of its author. Indeed, a program format can be a work if it is not only composed of ordinary elements but also blends them with other elements that reflect the creative intellect of its author.

In the assessment of the condition of individuality, a different approach should be preferred for each type of work. Regarding program formats, it is deemed necessary to evaluate them based on their fictional or non-fictional nature, as well as their level of concreteness and individuality. In this context, a program format that is based on fiction, is adequately fixed in a concrete form, and that exhibits original or unique elements would satisfy the subjective condition. On the other hand, since non-fiction formats, unlike fictional ones, repeat the same theme and do not include detailed elements, it will have to be accepted that a format of this nature does not carry the subjective element. A contrary view would lead to the monopolization of essential elements that should be available to all and would expand the scope of copyright protection in a way that would unduly limit freedom of expression. However, in practice, formats are often the subject of license agreements, and the licensee is obliged to provide the producer. Also, it is worth noting that program formats often enter into licensing agreements, wherein the licensee is granted access to a production bible that meticulously outlines the rules, characteristics, and elements of the format. In light of this, it would be unfounded to contend that a program format, duly fixed in written form with comprehensive details, lacks the required condition to be deemed a work.

Another condition for an intellectual creation to be considered a work is that it must be included in one of the categories of works of science and literature, musical works, works of fine art or cinematographic works specified in Article 1/B-a of the IPL. The ongoing debate revolves around whether program formats can be classified as cinematographic works or scientific and literary works.

While there are varying opinions in the legal doctrine regarding whether program formats can be protected as cinematographic works, the prevailing view is that they should be classified within the scope of scientific and literary works. Previous rulings of the Supreme Court demonstrate divergent perspectives, with certain earlier decisions asserting that program formats cannot be classified as works, while others suggest that formats should be regarded as works resembling cinematographic works. However, upon examining more recent rulings, it is observed that the court leans

towards the view that program formats, if they meet the objective and subjective conditions, can be recognized as scientific and literary works.

Program formats, as they exist in a fixed written form, are considered not to fulfil the requirement of being "a series of interconnected moving images" necessary for classification as cinematographic works. Within this context, it is essential for a specific format that satisfies the subjective condition to be protected as a scientific and literary work under Article 2 of the IPL. However, it must surpass the threshold of being a mere description related to a method, business process, or similar procedure.

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RESEARCH ARTICLE

Shifting Financial Privileges from Dynasty to Parliament In the Emergence of Modern Turkiye

Barış Bahçeci *

Abstract

This study deals with the emergence of modern Turkey in the axis of the change in financial privileges. In this respect, the acts of the parliaments are analysed with a descriptive approach. While the parliament conducted the liquidation process of the Ottoman dynasty, it also created some new privileges for its members. This study examines this simultaneous process. The liquidation process started in 1908 with the establishment of a constitutional monarchy initiated by the Committee of Union and Progress (İttihat ve Terakki Cemiyeti). Only after 1920, a national assembly convened under a new leadership in Ankara continued the process and seized the assets of the dynasty, ended tax privileges, and cut their allowances in 1924. However, during the same period, parliament extended the financial status of its members with laws enacted even unconstitutionally. Despite that allowances of MPs were increased, and rules creating pension rights turned into a legislative behaviour that set an example for the following decades too. Moreover, parliament also established financial privileges by tolerating the economic activities of its members. Thus, financial privileges based on blood ties were replaced by another type of privileged status in parallel with the transfer of sovereignty.

Keywords

Dynastic privileges, Parliamentary privileges, Equality, Populism, The emergence of modern Turkiye

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

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I. Introduction

In his memoir book *Çankaya*, Falih Rıfkı Atay, a deputy and a journalist, enthusiastically describes the liquidation of the Ottoman Dynasty by the Turkish Grand National Assembly (TGNA) and reveals with disappointment that the abolished privilege regime was later re-implemented for its members. This study describes the change of sovereign power in Turkey in the last century in terms of financial privileges, within the framework of the relationship between financial privileges and sovereignty. I argue that in the new *status quo* established, the existence of financial privilege continues by changing its shape according to the identity of the one who has the authority to legislate financial laws.

Financial laws about who will be allotted public revenues often present a starker truth than the constitution.[1] Considering that the liquidation or creation of privileges through financial acts is an indicator of the transformation process, it is more important to analyze financial legislation than constitutional texts or political discourses. In this respect, my aim is to reveal the two dimensioned processes regarding the collapse of the dynasty, and the rise of the assembly, through the *acquis* of their financial privileges.

This process was completed in two stages. The first of these is the constitutional monarchy (*meşrutiyet*) period, from 1908 to 1920, in which the dynastic privileges were limited by the lower chamber of the Ottoman Parliament (*Meclis-i Mebusan*). The second period is the republican period, from the gathering of the TGNA in 1920 until the complete abolition of the Ottoman dynasty in 1924. While the political demand that dominated the Meclis-i Mebusan was equality, the legislative policy of TGNA was shaped by republicanism. Therefore, examining the legislative activity of this period will also reveal the effects of the dominant political values, on the dynasty and the parliament.

Most of the material of the examination consists of the official minutes of the Meclis-i Mebusan and its successor the TGNA. The negotiations on those bills regarding tax, budget and allocation issues shed light on the arguments and attitudes of the deputies between the years 1908-1924. Thus, these materials were inductively evaluated, and the legislation policy that followed regarding financial privileges was described and analyzed.

II. Liquidating The Privileges of The Ottoman Dynasty

The 1876 Constitution was a breaking point in terms of limiting the authority of the Ottoman dynasty. Nevertheless, this first constitutional monarchy experience ended

1 J. A. Schumpeter, 'The crisis of the tax state', in *J. Schumpeter The Economics and Sociology of Capitalism* (ed.) R. Swedberg (Princeton University Press 1991) 100-101.

with Abdülhamid II's dissolution of the Ottoman Parliament in 1878. The second constitutional monarchy era emerged by the Committee of Union and Progress (CUP/ *İttihat ve Terakki Cemiyeti*). The new era, which began in 1908, was shaped by the CUP ruling, depending on the majority in the Ottoman Parliament. However, the constitutional regime led to a limited liquidation process for the dynasty. Because, unlike the low-ranking deputies of the CUP, its leadership preferred to restore the dynasty and exploit it for their own purposes, rather than completely liquidating it.[2]

It is possible to examine this liquidation process in three periods. The first period lasted from 17 December 1908, when the Ottoman Parliament (including the lower chamber Meclis-i Mebusan and the upper chamber *Heyet-i Ayan*) was convened, to 27 April 1909, when it unanimously decided to dethrone Sultan Abdulhamid II. He was held responsible for the failed coup d'état attempt (*31 March Rebellion*), but in addition, a notable reason cited for the dismissal of his illegal expenditures from the State Treasury. Then the second period started with the successor sultan, Mehmet V (Reşad) who was docile and passive in the face of the CUP rule. This period lasted until his death, and in 1918, Mehmet VI (Vahdettin) the successor to the throne, seized power with a counter-coup, and aimed a restoration of the dynastic privileges.[3]

A. The Legacy of the Meclis-i Mebusan

Immediately after the Ottoman Parliament convened in 1908, various bills on the dynasty's financial privileges were proposed, although on a rather haphazard and irregular basis. Also, an examination of the minutes of Meclis-i Mebusan reveals that many demands and objections to these privileges were also inconclusive. We can observe these efforts and their consequences under the titles of dynasty's (1) assets, (2) tax privileges and (3) allowances.

1. Efforts to Liquidate Dynastic Assets

In the Constitutional Monarchy era, regulations covering the assets of the Ottoman dynasty were mainly focused on the financial acts of the ousted Sultan Abdülhamid II, who had exploited his powers to create a fortune for himself. As part of the modernization efforts on the Ottoman financial system in 1840, his father, Sultan Abdulmecid had transferred the dynastic properties (*Emlakı Hümayun*) to the state treasury except for five farms,[4] and the remaining continued to be facilitated by the dynastic treasury which was reorganized under the name *Hazine-i Hassa* in 1850.[5] Abdülhamid II stands out in that, not only did he reclaim the transferred properties to the Hazine-i Hassa, but

2 Feroz Ahmad, *The Young Turks* (Oxford 1969) 164.

3 Sina Akşin, *Mutlakiyete Dönüş* (4th Edition, T. İş Bankası Kültür Yayınları 2010) 529.

4 Yavuz Cezar, *Osmanlı Maliyesinde Bunalım ve Değişim Dönemi* (Alan 1986) 289.

5 Arzu T. Terzi, *Hazine-i Hassa Nezareti* (Türk Tarih Kurumu 2000) 21, 81.

also registered much land and many business privileges, such as mining and maritime facilities, during his 33-year reign. These property and privilege gains were made by his unilateral transactions, supported by his absolute power ie. in some purchases, the price was set by him.[6] This fact was also observed by the members of the Budget Committee of Meclis-i Mebusan (*Muvazenei Maliye Encümeni*), who revealed that the state treasury assets were acquired by the dynasty at a price lower than their real value.[7] Thus, the most important financial result of his absolute power is the fact that he registered his assets in his name, unlike any previous sultan in the Ottoman Empire.[8]

The 1908 revolution brought the end of this privileged status and in this context, one of the key issues was how the dynastic assets would be liquidated, and how the new financial status of the dynasty would be determined. As a first step, on 26 October 1909, the Hazine-i Hassa was transformed from a ministerial organization to a general directorate, and its structure was reduced.[9] While those assets registered in Abdülhamid II name were gradually transferred to the state treasury, other dynastic estates acquired before his reign remained in the Hazine-i Hassa.[10] In 1912, new government regulation was enacted for the administration of these assets, limiting the authority of the Hazine-i Hassa (and the Sultan), and involving the government and local administrations in the disposal procedure.[11]

However, the first transfer was carried out by the decision (*irade*) of Abdülhamid II, even before the convention of Assembly, on 14 September 1908.[12] The motivation was to settle dynastic debts, rather than being a republican effort to confiscate dynastic assets. In fact, due to the bankrupt balance sheet of the Hazine-i Hassa, a loan was taken from the Ottoman Bank to pay its debts, and, in return, some of the dynasty's immovable were transferred to the state treasury[13] This motivation continued to determine the liquidation process, so much so that, under a new law, in the following year, the government was authorised to borrow to pay off these dynastic debts.[14]

During this period, the deputies made a number of proposals regarding the seizure of dynastic assets, but none were enacted at the plenary session.[15] This inability to act continued after Abdulhamid II was exiled.[16] Instead of the legislative initiative, some other

6 Vasfi Şensözen, *Osmanoğullarının Varlıkları ve II. Abdülhamid'in Emlaki* (Okuyanus 2013) 80-82.

7 *Meclis-i Mebusan Zabıt Ceridesi* (*MMZC)*, 02 Temmuz 1325, 366.

8 Terzi, (n 5) 92.

9 Ibid 165.

10 Ibid.

11 Emlakı kadime-i hakaniyeden olan mahaller hakkında nizamname: *Düstûr* V II (4) 12.04.1912, 452.

12 400,000 liralık irad-ı senevisi bulunan emlak-i şahanenin Hazine-i Maliye'ye devriyle Hazine-i Hassa'nın tesviye-i düyunu için bir istikraz akdi hakkında irade-i seniyye: *Düstûr* V II (1) 14.09.1908, 76.

13 Şensözen, (n 6) 108.

14 Hazine-i hassadan hazine-i Maliyeye müdevver düyunun suret-i tesviyesi hakkında kanun, *MMZC*, 02 Temmuz 1325, 408.

15 *MMZC*, 08 Kanunusani 1324, 286.

16 *MMZC*, 19 Nisan 1325, 160.

means such as the proactive participation of successor Sultan Reşad and the government were preferred. For example, immediately after the 31 March Rebellion, the new Sultan decided that many business privileges which had been registered to Hazine-i Hassa by Abdülhamid II should be transferred to the state treasury.[17] The following month, a bill which was drafted by the government in line with the Sultan's will was presented to Meclis-i Mebusan to enforce the liquidation process.[18] This situation reflected the power balance in the country. As an instruction, the Parliament was not functional, and power lay with the old Sultan Reşad, who was under the influence of the CUP.

Nevertheless, it was inevitable for the Ottoman Parliament to intervene in the fate of a dynastic property, such as the Yıldız Palace, which was associated with Abdülhamid II's oppressive rule, and symbolized his position. The bill transferring its possession to the state treasury was enacted by the lower chamber Meclis-i Mebusan. The key point was the divisions, attitudes, and rhetoric during the negotiations on this issue, particularly, the statement of Yusuf Kemal Tengirşenk, who would become a TGNA member and minister nearly twelve years later in historical context: 'Yıldız is the property of the nation, and will have a special place in Ottoman history. There is no longer any separation between the Sultan and us'.[19]

Yıldız Palace continued to be a source of inspiration for multiple initiatives spanning the entire Constitutional Monarchy era.[20] In this respect, there was an effort to transfer Yıldız Palace into public property and to erase its royal identity by turning it into a museum. After the 31 March Rebellion, however, a proposal for converting the Yıldız Palace into a museum was rejected in the plenary session due to dissatisfaction with details, such as the fate of the statues within.[21] On the same day, three deputies conducted a search of the Yıldız Palace, overseen by Mahmut Şevket Paşa, the army commander, who had suppressed the rebellion and asked to participate in the Meclis-i Mebusan as an observer. The minutes regarding the seizure of the jewels and the information regarding the money and bonds held in German banks were read in the plenary session.[22] In the same session, it was discussed how to seize the money in German banks, and eventually, upon the government's efforts, this money and the bonds were brought to the former Sultan Abdulhamid II who was in exile in Thessaloniki, and then delivered to the government by a mutual agreement.[23]

17 This transaction is not encountered in Dûstur, but the next sultan, Vahdettin, refers to the decision of "21 April 1909" that this transaction was withdrawn (footnote 26).

18 *MMZC*, 03 Haziran 1325, 412.

19 *MMZC*, 06 Ağustos 1325, 569.

20 So much so that the CUP gave the banquet it organized in honour of the first anniversary of the 1908 revolution in Yıldız Palace. *MMZC*, 08 Temmuz 1325, 473.

21 *MMZC*, 19 Nisan 1325, 160.

22 *MMZC*, 21 Nisan 1325, 206.

23 Terzi, (n 5) 157.

As well as the confiscation of dynasty properties, it was also an issue how to assess their value. Among the stocks of Abdülhamid II were those belonging to Anadolu Railways Co. which were exempt from liquidation due to their strategic importance, and which were subsequently transferred to the state treasury.[24] The seized jewels were put up for sale under a new law, and the revenue was to be paid to an association established by the CUP to improve the Ottoman fleet (*Donanma Cemiyeti*).[25] The remaining properties were transferred from the dynastic treasury to the state treasury, and the government was authorized to sell them by provisional budget law in 1909.[26]

The repercussions of this liquidation process continued. One of the most important of these was the donation by crown prince Yusuf İzzettin of 67 of his 87 shops in the Tophane neighbourhood to the army in 1911. This was after the Council of Ministers (*Heyet-i Vukela*) decided to investigate how he obtained the goods registered in his name.[27] Despite these circumstances, such a donation was appreciated by the Assembly, and even a law was enacted to exempt such transactions from taxes and fees arising.[28]

After the death of Sultan Reşad on 4 July 1918, Vahdettin ascended to the throne. Upon the final defeat in World War I, he dissolved the Meclis-i Mebusan and initiated a restoration of dynastic power.[29] However, after the occupation of the country, he lost the power to expand the dynasty's wealth. Instead, he sought to garner sympathy for political gains through his dealings on dynastic estates. In this context, he donated his own land to Armenian orphans at a time when accusations were being made by the Allies regarding massacres of the Armenian population,[30] and for the sake of his domestic reputation, he also allocated some dynastic palaces to be used as Muslim orphanages.[31]

The other actions and transactions of the sultan regarding the property belonging to the dynasty were also shaped by the conditions existing during the occupation. On 8 January 1920, a decree was issued for the return of the dynasty's properties, which had been previously transferred to the state treasury.[32] The motivation for this was to reduce the loss of land in the countries that were assumed to have been lost at the end of the war, rather than to gain wealth for the dynasty.[33]

24 *MMZC*, 09 Şubat 1326, 163.

25 *MMZC*, 03 Mart 1327, 88.

26 *MMZC*, 28 Mayıs 1325, 293. However, next year Cavit Bey declared that the money obtained from Abdülhamid II was only 450 thousand liras. *MMZC*, 10 Nisan 1326, 295.

27 Terzi, (n 5) 153.

28 Veliaht-ı Saltanat Hazretleri tarafından ciheti askeriyeye terk ve teberru edilen altmış dört bâb dükkânın ferağ harcı ve damga resminden muafiyetine dair kanun *MMZC*, 12 Nisan 1327, 513.

29 Sina Akşin, *Son Meşrutiyet* (4th Edition, T. İş Bankası Kültür Yayınları 2021) 74.

30 Gotthard Jaeschke, *Türk Kurtuluş Savaşı Kronolojisi I* (Türk Tarih Kurumu 1989) 78.

31 *MMZC*, 10 Mart 1336, 400.

32 11 Eylül 1324 ve 21 Nisan 1325 tarihli iradat-ı seniyye mucibince hazine-i hassa-i şahaneden cihet-i Maliyeye devredilmiş olan emlak ve arazi ve müessesat ve imtiyazatın hazine-i müşaraleyhaya iadesi hakkında kararname *Düstûr* V II, (11) 08.01.1920, 561.

33 Abdülhamid II, who had previously lost Cyprus to the British Empire, continued to have rights on the immovable that he

2. Efforts to Reduce Dynastic Appropriations

The change in the approach to the sultans' appropriations dates back to the *Tanzimat* period when reform in the state treasury in 1840 meant that sultans were limited to receiving a fixed allowance named as *tahsisatı seniyye.*[34] Nevertheless, the authority to raise this allowance was still under their control. By the Constitution of 1876, a stricter regime regarding the budget was initiated, by a law regulating the expenditures made from the state treasury. However, in reality, Abdülhamid II continued to determine his appropriations completely on his initiative, and without being subject to restrictions during his absolute rule.[35] From this point of view, Meclis-i Mebusan exhibits two important features, the seizure of the sultan's authority on behalf of the national will, and the pursuit of an anti-regime policy in dynastic expenditures. Thus, after pre-existing but, as yet, unenforced rules were applied; the expenditure of the dynasty was limited by law.

In a ground-breaking step, the Meclis-i Mebusan, from 1909 onwards, used the budget-making authority including the authority to determine allocations of the dynasty. From the very beginning of this era, its Budget Committee started to regulate the distribution of expenditures, and during the preparation of the dynasty budget, played a more active role than the government in shaping the procedure to be employed. Firstly, through a temporary budget law,[36] the details of the payments to be made to the dynasty were illustrated on charts. In addition, the remuneration of the members of the dynasty was fixed according to their status, and the amounts to be paid were standardized and made public. Thus, the members of the dynasty, like other citizens, were bound by the rules set by the Meclis-i Mebusan.

The first indication of this significant change was the historic speech of Mehmet Cavit Bey, who presented the bill as the head of the Budget Commission. He declared that the Commission had completely abolished the palace appropriation (*saltanatı hûmayun*), and in addition, the appropriation allocated for the repair of the palace buildings (*sarayı hûmayunların ebniye tamiratı*) was transferred from the Dynasty budget to the authority of the Ministry of Finance.[37] Thus, the authority of the dynasty to spend according to its own rules was largely abolished.

Moreover, firstly by the temporary budget law bill that was presented to the Meclis-i Mebusan in March 1909, a major reduction was made in Abdülhamid II's

previously owned on the island. Thus, the transformation of state lands into the dynasty's private property was intended to be constructed as a collusive legal guarantee on the lands that are subject to be lost. Terzi (n 6) 94.

34 Cezar, (n 4) 289.

35 *MMZC*, 02 Temmuz 1325, 365.

36 According to the Ottoman financial system, fiscal year starts on March 1. Therefore two temporary budget laws were enacted for March and April 1909, and then for May 1909, as the budget law could not be completed in time.

37 *MMZC*, 28 Mart 1325, 3.

allowance from 367,940 to 25,000 liras.[38] Mehmet Cavit Bey also stated that, except for that of Mehmet V Reşad (then crown prince), salaries were eliminated by the Budget Commission. In this respect, the salary of Vahdettin (first in line to the throne after Mehmet Reşad), and another heirs was reduced from 800 to 500 liras, in line with others.[39] After temporal budgets, on 20 July 1909, negotiations began on the annual budget. The speech of Emrullah Efendi, who replaced Mehmet Cavit as the head of Budget Commission, was also remarkable: 'You will see that 300 thousand liras were given in place of the previous 600 thousand liras as allowance for the Dynasty. It indicates that the power of tyranny has been defeated in a country.'[40] Statistically, the palace and dynasty appropriations were 5.3% in the budget in the period of Abdülaziz, falling to 4.6% in the period of Abdülhamid II, and to 1.5% in the Constitutional Monarchy era, i.e., dynasty appropriations fell by 2/3 compared to the period of Abdülhamid II.[41]

It can also be seen that the initiative to reduce the allowance came from the dynasty itself. For example, immediately after his reign began, Sultan Reşad asked Parliament to reduce his allowance from 25 to 20 thousand liras in view of the country's economic difficulties.[42] While this renunciation was met with strong and sustained applause in Meclis-i Mebusan, the background is more complex than it appears. According to the memoirs of Halit Ziya Uşaklıgil, who was appointed by the CUP as the chief clerk of the Sultan, (as such, a *de facto* palace commissioner), this move was in fact decided by the CUP, and made the sultan present it as if was his own wish.[43] The second example was Sultan Reşad's heir, Yusuf İzzettin, who donated some of his outlets to the treasury, also donated 250 liras to the army every month, since he was paid 24,000 liras in the 1915 budget, and for this, he was applauded at the plenary session of Meclis-i Mebusan.[44]

The authority to determine the dynasty appropriations was transferred from the Sultan to the Meclis-i Mebusan leading to the publication of its expenditures and the public reaction to this contributed to the liquidation of the dynasty. One of these reactions occurred while negotiating an offer to pay a salary to approximately 750 concubines in Yıldız Palace after the fall of Abdülhamid II, due to the loss of their financial resources. It was understood that these people, whose numbers could not

38 Ibid. However, three days later, the March 31 uprising began, and two weeks later, Abdülhamid II dethroned by the decision of Ottoman Parliament. Thus when the bill was enacted on 20.05.1909 (1325 senesi Mart maaşıyla Nisan ve Mayıs varidat ve mesarifi hakkında muvakkat bütçe kanunu) Abdülhamid II was an overthrown ruler.

39 Although no info was found in the parliamentary minutes, it was claimed that Vahdettin's connection with *the March 31 Rebellion* against the CUP had an effect on this reduction. Akşin (n 4) 23.

40 *MMZC*, 20 July 1325, 33.

41 Sina Akşin, *100 Soruda Jön Türkler ve İttihat ve Terakki* (Gerçek 1980) 146.

42 *MMZC*, 21 Nisan 1325, 203.

43 Halit Ziya Uşaklıgil, *Saray ve Ötesi* (Can 2019) 93-95.

44 *MMZC*, 29 Kanunuevvel 1330, 142.

be determined precisely because there was no register of names, had been sold to the Palace, and that some were orphans. Parliament fixed a salary to prevent them from falling into prostitution,[45] but since their exact numbers could only be determined at the end of the year; a new law was later passed on the subject.[46]

The expenses for the marriage of the princess brought even more abrasive criticisms. Since the first annual budget law, it became public knowledge that 12 thousand liras were allocated for the dowry costs of the two sultans who would marry that year. This figure is based on the decision of the Council of Ministers to include an allowance in the budget for the marriage of two sultans every year.[47] Mehmet Cavit Bey was a member of the Council of Ministers at that time, and this meant a consensus in the determination of dynasty appropriations. However, this compromise cannot be said to have received the approval of all CUP member deputies. For example, while discussing this appropriation, Mehmet Talat Bey argued that 'People eat soil in Anatolia, is it appropriate? I do not accept it', and the plenary session descended into chaos and commotion.[48]

It soon became clear that this backlash was not solitary, and that the debate over dynastic privileges was dividing Meclis-i Mebusan. Some deputies such as Mahir Said Pekmen and Ömer Feyzi Efendi with pro-monarchy stances were members of the opposition;[49] however, the CUP was similarly divided on the same issue. The leadership of the CUP adopted a line that saw the dynasty as sacred and privileged during the reign of Sultan Reşad and suppressed the dissenting voices within the party. For this reason, one group, including senior party members, acted to protect the financial situation of the dynasty, while another group, consisting of CUP deputies, developed becoming increasingly in favour of the liquidation of these financial privileges, adopting a covert republican attitude.

The issue of payment of dynastic grooms was the most striking example of this phenomenon of suppressing controversial issues. Firstly, at the budget law negotiations in March 1909, Mehmet Cavit Bey as the Head of the Budget Committee announced the abolition of the grooms' (i.e., sons-in-law) salaries.[50] However, in July of the same year, when Sultan Reşad succeeded Abdülhamid II and Mehmet Cavit Bey became the Minister of Finance while negotiating the annual budget law bill of 1909, he reversed this stance. He offered to pay a temporary salary until the grooms found

45 *MMZC*, 14 Haziran 1326, 592-596. Tebeddül-i saltanat hasebiyle saraydan çıkarılıp tensikat kanunundan istifade edemeyen ecirlere verilecek mebaliğ hakkında kanun: *Düstûr* V II (2), 03.07.1910, 419.

46 *MMZC*, 18 Kanunuevvel 1326, 712. Yıldız Sarayı›ndan muhrec cariyelere Düyun-i Umumiye bütçesine zamimeten 144,725 kuruşun sarfı hakkında kanun: *Düstûr* V II (3), 16.01.1911, 38.

47 *MMZC*, 24 Haziran 1325, 211.

48 *MMZC*, 20 Temmuz 1325, 56.

49 *MMZC*, 02 Mart 1327, 72.

50 *MMZC*, 28 Mart 1325, 4.

employment, a policy opposed by the CUP deputy Mehmet Ali Bey, who argued that 'if a sultan has a daughter, he can give it to whomever he wants, and the people will not interfere with him. But the people are not obliged to give money to the man he will give his daughter to (...) Let him (the groom) work and earn his living like me.' Nevertheless, the proposal was enacted, and an allowance was granted to unemployed grooms.[51]

This topic flared up into a government crisis the following year. In the 1910 budget bill, the Minister of Finance Mehmet Cavit Bey again proposed to pay six unemployed grooms who had married by the order of Abdülhamid II. Despite the government and the budget committee's support, this proposal was rejected at the end of a controversial session.[52] Interestingly, some CUP deputies advocated the payment of grooms in 1910, but in 1924 as CHP deputies, voted to abolish the dynasty.[53] But after four days, Grand Vizier (*Sadrazam*) İsmail Hakkı Paşa stated that to reject Mehmet Cavit Bey's proposal on the groom issue in the plenary session would show a lack of trust for the government. After long discussions, it was revealed that rather than demand a resignation or a vote of confidence, the government merely tried to persuade the Meclis-i Mebusan to hold a new vote on this issue. Eventually, İsmail Hakkı Paşa was successful with the support of CUP leaders, speaker Ahmet Rıza Bey and the head of CUP group Halil Menteşe, and the proposal regarding payment of grooms was accepted by 152 to 30, after being rejected by 54 votes to 64 only four days previously.[54]

The following reactions of whip Halil Menteşe were in line with this attitude. After two months, in a discussion over the fiscal powers of Heyet-i Ayan, he argued that since the members of the Ayan were appointed by 'the greatest deputy of the nation', the sultan, they are equally the representative of the nation as the members of the Meclis-i Mebusan, who were elected by popular vote.[55] Similarly, Ahmet Rıza Bey, who was one of the leaders of CUP and the speaker of Meclis-i Mebusan, demanded the approval of the dynasty budget during the 1911 budget negotiations.[56] In the following year, Halil Menteşe, who was elected the new speaker continued this effort, and the dynastic allowances in the 1912 budget were enacted without opposition in the plenary session.[57]

51 *MMZC*, 20 Temmuz 1325, 55.

52 *MMZC*, 17 Nisan 1326, 504.

53 While the CUP members Hasan Fehmi Tümerkan and Ahmet Mahir Ballı defended the grooms should be paid Ahmet Ferit Tek (who will also be the first finance minister of Turkey in 1920) was opposed.

54 *MMZC*, 21 Nisan 1326, 550. It should be also noted that at this time Ahmet Ferit Tek accepted the offer.

55 *MMZC*, 13 Haziran 1326, 575.

56 *MMZC*, 02 Mart 1327, 72.

57 *MMZC*, 21 Haziran 1328, 66.

By the 1914 elections, the power of CUP in the Assembly increased, nevertheless the debates continued, and even a conflict emerged over the bill on dynastic allocations. Article 9 of the draft bill regulated that no allowance should be paid to the sultan's children. One of the CUP leaders and the Minister of Interior Talat Paşa demanded that they should have a small allowance, but upon the objection of deputies in the plenary session, the Minister of Finance Cavit Bey, requested that the bill be sent to the Budget Committee. Süleyman Sudi reacted very abruptly: 'There is no need, sir. We can't give it to him, wherever it goes.' The majority of the deputies voted against the CUP leaders Talat and Mehmet Cavit.[58] However, still, it was hard for either side to claim victory because, in the same law, another article was adopted to pay grooms who had married before the constitutional monarchy period.[59] Also remarkable is that, after this unsuccessful attempt, the CUP government opted to increase some dynastic allowances by a decree the following year.[60] Finally, in 1917, the final law was enacted, allowing payment to the wives of the deceased sultans.[61]

The end of the constitutional monarchy era witnessed a reverse process for a limited time. After dissolving the Assembly, the last Sultan Vahdettin increased his allocation by himself.[62] Thus, at the end of the constitutional monarchy period, it was not possible to remove dynastic appropriations from their privileged status; yet, a decade later, those same deputies would succeed in passing a law completely abolishing the dynastic status. In this respect, Mehmet Sabri Toprak, who was the chairman of the Budget Commission which had drafted the bill for payment to grooms in 1914, became one of the deputies who voted for the abolition of the dynasty in 1924.

3. Efforts to Abolish Tax Privileges

Two initiatives shaped the constitutional monarchy era in terms of dynastic tax privileges. First, the effort to abandon unlawful practices, and, second the raising of demands to abolish the dynasty's tax exemption, which would lead the country to a *de facto* republic.

The first issue was regarding Abdülhamid II who abused his sultanate powers during his reign to create tax privileges in favour of Hazine-i Hassa. Defying Article 96 of the 1876 Constitution, which authorizes the Parliament alone to act on this issue, he cancelled tax debts of those assets previously purchased.[63] Moreover, in 1876 he granted tax exemption to the businesses owned by Hazine-i Hassa. Thus, farmers

58 *MMZC*, 07 Temmuz 1330, 498.

59 Ibid 497.

60 Hanedanı Saltanatı Seniye muhassasatı hakkındaki kanunun on birinci maddesinin tadiline dair kanun-u muvakkat MMZC, 14 Kanunuevvel 1331, 242.

61 *MMZC*, 22 Mart 1333, 297.

62 Akşin, (n 31) 73.

63 Terzi, (n 5) 98.

working the lands belonging to the dynasty were obliged to pay the agricultural production taxes (*öşür*) to the Sultan, not to the state.[64] According to the Minister of Finance, the sultan's fortune entrusted to German banks was obtained by those taxes, which had been diverted from the state treasury.[65] Thus, one of the consequences of the constitutional monarchy era was ending such a de facto privilege,[66] and from this time onwards, all tax exemptions were granted only by Meclis-i Mebusan, even those involving dynastic donations.[67]

Under the second issue, a division grew up over the removal of the tax exemption, which is among the *de jure* financial privileges, during the negotiations on the first tax law draft regarding immovable tax (*musakkafat*). Within the Assembly, a group of deputies representing a wide range of views argued that the dynasty should be taxed in a way that virtually implied a *de facto* republican regime. For example, among the CUP deputies, social democrat Armenian Ohannes Varteks, defended the levying of taxes on the members of the dynasty other than the sultan,[68] while an Islamic cleric Mustafa Sabri, took an even more radical position, rejecting an exemption for the sultan.[69] In the same vein, İbrahim Vasfi made the following argument, based on the existence of law, making both the nation and the dynasty equal before the law, without any privileges: 'Today, from the point of view of both the titles of His Excellency Sultanate and the Supreme Dynasty, it is necessary to be no different from other people in this tax issue, so even their real estate should be taxed.'[70]

The draft law, prepared by the government, gave dynasty members taxpayer status only if they earned rental income. Some of the ministers could be considered as representatives of the ancient regime of Abdülhamid II, but their draft was supported also by the high-ranking CUP leaders. One of these, Ahmet Rıza Bey, who chaired the session, argued that it was unbecoming even to talk about the dynasty in such a disrespectful way. Mehmet Cavit Bey agreed, stating that no taxes were collected from dynasties anywhere in the world.[71]

Eventually, the bill was enacted, but only taxed the dynasty over the rentals. Nevertheless, four years later, this debate resurfaced with a proposal to amend the tax law to extend the exemption to include the rest houses belonging to the dynasty. This

64 Sina Akşin, *Yakın Tarihimizi Sorgulamak* (Arkadaş 2006) 46. Although Mehmet Tahir Bey proposed to pay the collected taxes to the state, it was not discussed. *MMZC*, 30 Haziran 1325, 339.

65 Terzi, (n 5) 156.

66 Before him, dynastic farms were being taxed. Terzi (n 5) 18. Moreover, in the Sultan Abdülmecid era those dynastic transactions over immovable were taxed. Terzi (n 5) 84.

67 For example: Merhume Âdile Sultan'a ait olup, inas mektebi ittihaz olunan sarayın ferağ muamelesinin harç ve rüsumdan muafiyeti hakkındaki kanun lâyihası. *MMZC*, 22 Kanunusani 1326, 513.

68 *MMZC*, 03 Mart 1326, 197.

69 Ibid 214.

70 Ibid 216.

71 Ibid 213-215.

time, an objection was put forward by Cemil Zehavi, who pointed out the unfairness of this exemption considering the heavy taxes on the general population.[72] However, the leaders of CUP were once again victorious, and this exception was enacted by the Assembly. The era of constitutional monarchy thus ended.

B. TGNA as a Liquidator

Upon the occupation of Istanbul on 16 March 1920, Meclis-i Mebusan dissolved, and after a call by the leader of national resistance, Atatürk, the TGNA gathered in Ankara on 23 April 1920. According to his plan, the new Assembly consisted of former Meclis-i Mebusan members and newly elected deputies.[73] Both groups included former CUP members whose political agenda was full of egalitarian and republican demands. There was one important difference, however, that during the constitutional monarchy era, the leaders of the CUP who blocked anti-dynastic ideas were purged on the grounds of their responsibility for the defeat in World War I. Thus, the radical liquidation of the dynasty with its financial privileges was simultaneous with a new state restructuring in the first and second terms of TGNA.

1. First Term of TGNA

In its first term (1920-1923) TGNA acted in unity as far as possible to secure a military victory. So much so that, in the beginning, to placate the monarchist deputies, allegiance was sworn to the Sultan. However, Vahdettin's hostile attitude towards the national resistance by inciting rebellions,[74] and his cooperation with the Allied Powers soon created a major reaction in the TGNA.

The first sign of the reaction was regarding dynastic assets' administration. After the TGNA government seized the İstanbul government's authority over the Ottoman territory (except İstanbul), some farms of the Hazine-i Hassa were also taken over. During the negotiations on a government-led bill at the plenary session, TGNA's Minister of Finance Ahmet Ferit Tek announced that by this action, the Assembly had fully taken the rights of the nation into its hands. This was a clear message, meaning that those assets belonged to the nation, rather than the dynasty; all that remained was to legalise the TGNA's *fait accompli* seizure of these assets.

During the negotiations, while some of the deputies argued that it was too early to sell them, the dissidents, the former CUP members, expanded the debate to include the issue of the legitimacy of dynastic financial rights.[75] These arguments showed

72 *MMZC*, 02 Mayıs 1330, 289. Hanedanı Saltanat azasının ibadet ve teferrüçlerine mahsus müsakkafatın vergiye tabi olmadığına dair kanun.

73 *Atatürk'ün Tamim, Telgraf ve Beyannameleri* (Atatürk Kültür, Dil ve Tarih Yüksek Kurumu 1991) 280.

74 Sina Akşin, *İç Savaş ve Sevr'de Ölüm* (4th Edition, T. İş Bankası Kültür Yayınları 2010) 104-138.

75 Türkiye Büyük Millet Meclisi Zabıt Ceridesi (*TBMMZC*), 01 Teşrinisani 1336, 268.

that the anti-monarchist stance was not only still alive, but had grown even stronger over the last decade.[76]

The budget laws adopted by the TGNA, and the status it gave to the sultan and the dynasty are indicators of the progress of this period. The budget law of 1920 included dynastic allowances; however, since Vahdettin remained in Istanbul, all were cancelled on the last day of the fiscal year.[77] This situation continued in the following year's budget.[78] The sultanate, which came to represent the anti-nationalist line of Vahdettin, was not abolished until 1 November 1922, after the military victory against the occupation in Anatolia, and before the negotiations for the peace treaty began. While this move removed Vahdettin from office, Crown Prince Abdülmecid was elected caliph in his place by TGNA, and the dynastic allowances continued to be paid.

While discussing a series of temporary budget laws enacted for the expenditures to be made for the new administration of İstanbul beginning on 6 November 1922, deputies were already questioning the future of the dynasty. In a discussion of civil servant payments, Emin Erkul made a point targeting dynastic financial rights, arguing that if savings were desired, the dynastic family should take the first step.[79] However, no such step was close. Ali Rıza Bey asked about the rationale for the payment for the members of the dynasty, Hasan Fehmi Ataç, the Minister of Finance, replied that the decision on this issue would be made by the TGNA.[80] However, the said decision was never taken, and in the 1923 budget law, the only change was in naming the dynastic allowance, to replace the term 'sultanate' with 'his excellency caliph and caliphate dynasty' (*Zatı Hazreti Hilafetpenahi ve Hanedanı Hilâfet*).[81] Thus, the dynastic family continued to receive their allowances from the TGNA government until the end of the first term.

2. Second Term of TGNA

The composition of the TGNA in its second term was determined mainly by Ataturk, who not only founded a disciplined group under the name of the People's Party (*Halk Fırkası*) but also, before the election, published a regulation regarding the policy to be followed by the new deputies. That document played a constitutional role, based on the prohibition of privileges, seen in the statement that 'Populists are individuals who do not accept the privileges of any family, class, community, or individual.'[82]

76 Hazine-i Hassaya Ait Bulunan Emlak ve Arazi ve Saire Muamelat-ı Tasarrufiye ve İdariyesinin Muvakkaten Maliye Vekâletine Verildiğine Dair Kanun, Law no 46, Enacted on 01.11.1920, *Resmi Gazete* (RG) 21.03.1921/7

77 *TBMMZC*, 26 Şubat 1337, 436.

78 1337 Senesi Muvazenei Umumiye Kanunu, Law no 197, Enacted on 26.02.1922, *Kavanin Mecmuası* (KM) V 1, 224.

79 *TBMMZC*, 06 Kanunuevvel 1338, 217.

80 Ibid 230.

81 *TBMMZC*, 28 Şubat 1339, 508.

82 Ibid.

After the Lausanne Peace Treaty, which ended the war, it was time to address the unresolved constitutional problems, such as the fate of the dynasty. Not surprisingly, critics began the liquidation process focusing on the dynasty's financial rights. The pioneer was the newly-elected Yusuf Akçura, one of the leading figures of Turkish nationalism. Since the provisional budget law, negotiated in September 1923, Akçura focused specifically on the privileged status of the members of the dynasty. He first recommended paying none but the caliph and his immediate family. Recalling the agenda and the discourse from Meclis-i Mebusan, he defined the grooms as parasites and pointed out that the source of these allowances was taxing on the rural poor.[83] In the negotiations the next day, Akçura revealed that the payments for grooms were in contradiction to the Party program in terms of prohibition of privileges. As a response to these arguments, Ali Cenani, the head of the Budget Committee, offered to resolve this issue in the 1924 budget law.[84]

However, before the promised 1924 budget negotiations, a total breakdown in the process occurred with the declaration of the republic on 29 October 1923. Then Yusuf Akçura once again took the stage with a historic speech: 'What we understand as the Republic and the People's Party, by democracy, is that all of them are completely equal in law, title, reputation and dignity, from the peasant, who we think the weakest, to the highest.' Depending on this consideration, he asked a very simple question: 'Now, how can we write the name of a completely unknown man, whose job, service, and merits are not known, in the official budget?[85] The next move was a very clear statement from Vasıf Çınar. He pointed out that the privileged life of the dynasty was financed by the public, and the conclusion was clear: 'The caliphate has no place in the budget approved by the Turkish Republic and this Assembly'.[86] Mazhar Müfit Kansu supported him, arguing: 'The only one who has a place in the budget is the right holder, and the right holder is only the citizen. The dynasty, on the other hand, is not a citizen; it does not have rights so that it has a place in the budget!'[87]

Although the result was clear, the provisional budget, adopted on February 28, 1924, was given a final appropriation for the dynasty before their deportation. In fact, according to the law enacted on 3 March 1924, the Ottoman Dynasty was abolished, along with all its financial privileges.[88] In this respect, the TGNA, in the name of the nation, took over the estates belonging to the Sultans (article 8), all the dynastic assets (article 10), and the furnishings, sets, tables, valuables and all kinds of property

83 *TBMMZC*, 26 Eylül 1339, 292.

84 *TBMMZC*, 27 Eylül 1339, 328.

85 *TBMMZC*, 25 Şubat 1340, 345.

86 *TBMMZC*, 27 Şubat 1340, 414-415.

87 Ibid 429.

88 *TBMMZC*, 28 Şubat 1340, 470.

within the palaces (article 9).[89] The administration of palaces was handed over to the National Palaces Administration, which was founded by the Budget Commission.[90] Thus, this successfully enacted the failed attempt to seize Yıldız Palace in 1909, and this time included all other palaces. The names of deputies on the list of those who proposed this law were also significant in this respect. Şeyh Saffet, the mover of the proposal signed by 53 deputies,[91] was a deputy in all three terms of the Meclis-i Mebusan.

Nevertheless, some members of the Ottoman dynasty, despite the loss of their dynastic title, continued to claim these assets, and some of their lawsuits were accepted by the Turkish Court of Cassation.[92] However, in 1949, TGNA, using its authority to interpret its laws, decided that after the law in 1924, dynastic property and their inheritance ceased to exist.[93] Similarly, after a Jerusalem court rejected the lawsuit filed by the heirs of Abdülhamid II for the lands in Gaza, no remnant of the dynasty's assets remained outside of Turkey.[94]

III. Parliaments Creating Fiscal Privileges on Their Own

Meclis-i Mebusan and TGNA abolished by law the financial privileges of the Ottoman dynasty, but also made laws regarding its own members' financial rights. Thus, although the parliamentary position was not a blood-based status like the dynasty, the monopoly of the law allowed the creation of financial privileges for its members. This function coincided with the dissolution of the dynasty, leading to the liquidation of their financial privileges, and the creation of new ones for the parliamentarians. There are several reasons for these developments at the time of the constitutional monarchy. These include internal or extra-parliamentary factors such as party policy, constitutional regulation, presidential or judicial review, and public pressure.

The financial parliamentary privileges can be classified under the forms of (1) active and (2) passive paths, which will be addressed below. In this context, while the former path occurs through the direct enacting of laws such as parliamentarians increasing their own allowances, the latter emerges by failing to prevent deputies from utilizing their positions for questionable commercial reasons.

89 Hilafetin İlga ve Hanedan-ı Osmaninin Türkiye Cumhuriyeti Memaliki Haricine Çıkarılmasına Dair Kanun, Law no 431, Enacted on 03.03.1924, (RG) 06.03.1924/63.

90 *TBMMZC*, 24 Mart 1340, 1031.

91 *TBMMZC*, 03 Mart 1340, 28.

92 Şensözen, (n 6) 151.

93 Hilâfetin ilgasına ve Osmanlı Hanedanının Türkiye Memaliki haricine çıkarılmasına dair olan 431 sayılı kanunun 8 inci maddesinin yorumu *RG* 07.05.1949/7201.

94 Şensözen, (n 6) 159.

A. Legislation as an Active Path to Create Privileges

Throughout both the Meclis-i Mebusan and TGNA terms, a debate continued over financial laws subjected, deputy allowances, travel expenses and retirement rights. Despite the similarity in the discussions and arguments applied to each institution, it is necessary to consider the issue from a chronological perspective and in terms of the contemporary conditions of both assemblies.

1. The Legacy of Mebusan

The issue of deputy allowances was regulated by Article 76 of the 1876 Constitution, rather than the law, like as Article 66 of the 1831 Belgian constitution. According to the original text, each deputy was to be given annually two hundred liras. Immediately after the 1908 revolution, Feraci Efendi proposed a constitutional amendment allowing this issue to be regulated by a special law.[95] The acceptance of this proposal was incompatible with the idealistic spirit that dominated the first years of the constitutional monarchy period; nevertheless, the majority of Meclis-i Mebusan viewed this appropriation problem from a different angle.

The first constitutional amendment package of 1909 emerged after the March 31 rebellion and the abdication of Abdulhamid II, and aimed to reduce the appropriations of Heyet-i Ayan. Almost all of its members were appointed by Abdülhamid II, and received more allowances than the deputies. This caused discomfort for those deputies elected by popular vote, and it became an issue of national sovereignty for deputies that the salaries of the sultan-appointed notables should be lower than their own. In conclusion, in 1909, the majority of deputies sought no financial gain for themselves. This is confirmed by the rejection of Kozmidi Efendi's proposal to increase the allocations during the negotiations.[96]

By this constitutional amendment package, however, the Meclis-i Mebusan allowances were increased from 200 to 300 liras annually, but this was to allow for the increase in the duration of parliamentary sessions from four to six months.[97] So, dividing the total allowance received by the number of months the Meclis-i Mebusan convened meant no change in monthly earnings (200/4=50 and 300/6=50). After the proposal was enacted, the bill was sent to Heyet-i Ayan following the amendment procedure, but that year, the Heyet-i Ayan approved articles only regarding the Meclis-i Mebusan, and postponed the article concerning its own members to the following legislative year.[98] This issue was never raised, and this is the first example

95 *MMZC*, 30 Kanunuevvel 1324, 138.

96 *MMZC*, 04 Haziran 1325, 451.

97 *MMZC*, 20 Nisan 1325, 25, 32 (Constitutional Commitee Report)

98 *MMZC*, 02 Ağustos 1325, 431.

of misuse of the legislative power regarding allowances, initiated by the upper chamber of the Ottoman Parliament.

On the other hand, the increase in the appropriations of the Meclis-i Mebusan entered into force, creating new disturbances. A new verbal argument ensued after İbrahim Efendi implied that the reserve appropriation placed in the budget of Mebusan would be abused by a needless extension of the session for the sole purpose of this appropriation.[99] It is understood that such accusations also found their way into internal party debates; the political program agreed upon at the CUP 1913 Congress contained no proposal for an increase in the allocations of the deputies, even if this meant that the sessions needed to be extended.[100]

It is noteworthy that the allowance issue generally led to quarrels among the deputies. While the deputies' budgets were being discussed in 1909, Sait Efendi proposed reducing allowances,[101] and in 1911, Artin Boşgezenyan even offered to work without pay.[102] Both were met with negative reactions from other deputies. In particular, Seyyit Bey, a member of CUP like Boşgezenyan, accused him of using the press in an attempt at self-promotion. Regardless of the intentions of the deputies who made these suggestions, it appears from the minutes of the plenary session that public opinion in İstanbul was that deputies received excessive salaries, and the deputies were aware of this view.[103]

The picture began to change after the fading of the dreams of freedom and equality that came with the birth of the constitutional monarchy. This is especially true after 1914, with the absolute power of the CUP in the Meclis-i Mebusan. By the constitutional amendment of 1915, the duration of the annual session was shortened from six to four months, as before 1909.[104] This amendment was made to reduce the power of the assembly in the face of authoritarian CUP, and therefore, the appropriation issue was not in question,[105] but, in fact, this indirectly resulted in an increase in allowances.

In the next step, the constitutional amendment of 1916 directly targeted deputy allowances. It was initiated by the CUP government and presented by Halil Menteşe, the Minister of Foreign Affairs.[106] Annual allowances increased from 300 to 500 liras, while travel expenses were reduced from 50 to 40 liras. In addition, in line with the

99 *MMZC*, 23 Nisan 1327, 234.

100 Tarık Zafer Tunaya, *Türkiye'de Siyasal Partiler* C I (Hürriyet 1988) 107.

101 *MMZC*, 20 Temmuz 1325, 57-58.

102 *MMZC*, 20 Nisan 1327, 148.

103 Ibid.

104 Düstûr V II (6), 749.

105 Cem Eroğul '1908 Devrimini İzleyen Anayasa Değişiklikleri' (Ed.) Sina Akşin et al. *100. Yılında Jöntürk Devrimi* (İş Bankası Yay. 2010) 117.

106 *MMZC*, 01 Şubat 1331, 18-19.

decision of CUP 1913 Congress, a rule was enacted of no additional appropriation in case of prolongation of the legislative period. During the negotiations, the opposite proposals not approved by party leaders, especially Talat Pasha, were rejected, even if they were in the deputies' interest.

When the Assembly was able to reunite with the forces of the national resistance movement in 1920, there was no official CUP identity or leadership. Meclis-i Mebusan was able to agree on a national oath (*misak-ı milli*) before dissolution due to the occupation of Istanbul. This oath is considered to be a very valuable founding document in terms of official history in Turkey, yet the Meclis-i Mebusan left another, although less well-publicised legacy. A law was enacted to increase deputies' allowances by unconstitutional means.

The draft law was prepared by the Assembly Administrative Committee and the Budget Commission, so rather than a party or governmental identity, it had a more inclusive institutional attitude. During the negotiations, the spokesperson of the Budget Commission, Muvaffak Menemencioğlu, cited the rent increases in Istanbul as a reason for an increase, but the opposite arguments espoused by Süleyman Faik Öztrak contained the total of the arguments put forward in the plenary sessions in the previous and following years.[107] The most important of these was that the deputies with budgetary authority were prohibited from setting a rule in their favour. As an exception, it argued that they can only increase allowances for the next period. On the other hand, counter-objections were also stereotyped. This includes the accusations that the deputies opposing the raise were publicity-seekers and emphasizing that they do not personally receive the increased amount. Nevertheless, a bill was enacted to increase annual allowances by one and a half times (500 + 750) to 1250 liras A few days later, on March 16, 1920, Istanbul was occupied by the Allied powers and, some deputies were taken into custody, while others fled to Ankara to join TGNA carrying with them in their luggage the same allowance issues.

There was a further financial privilege proposal inherited by TGNA from this period: extending the retirement rights. A proposal regarding deputies who were formerly civil servants was not enacted;[108] however, others were enacted in the TGNA era. Meclis-i Mebusan also had a legacy concerning the establishment of an accounting system; its accounts were kept by its own administration, and audited by the Budget Committee. In the last step, reports were presented in the plenary session for release.[109]

107 *MMZC*, 11 Mart 1336, 436.

108 *MMZC*, 04 Şubat 1330, 389.

109 *MMZC*, 16 Şubat 1330, 476.

2. The Era of TGNA

Although the TGNA was established in extraordinary wartime conditions, one of the first confidential sessions addressed the issue of the deputy appropriations. The plenary session decided that the annual appropriations would be 1,250 liras, as was the case for Meclis-i Mebusan.[110] This decision, often repeated in the future, proved that deputies with opposing political views were very willing to agree on their financial rights. So much so that Atatürk, a leader known for his harsh discourse against opponents, in this issue, needed to become much milder.[111] It is also noteworthy that, despite Atatürk's claims that the TGNA broke with the traditions of the Ottoman Constitutional order, this was not reflected in the majority vote in terms of allowances.

Unlike the four months-long annual sessions of Meclis-i Mebusan, TGNA adopted the rule of being in constant meeting. Therefore, a new payment model was enacted, including, in addition to the four-month allowance, for frequently-participating deputies, a sum of paid one hundred lira monthly as compensation.[112] Thus, on the condition that they attended all meetings, the deputies would be entitled to receive an additional allowance of 800 liras. A few months later, the rule was amended, increasing the annual allowance to 2,400 liras, without seeking the condition of attendance. Through this arrangement, appropriations were also increased. Interestingly, according to the minutes, the proposal, submitted with the signatures of 60 deputies, was accepted with a majority large enough to avoid the need for negotiation, 69 votes to 32.[113]

The last amendment on this issue was noteworthy, as it was made before the elections in 1923. The payment method was changed, and the annual allowance started to be paid in advance. Thus, the deputies going to the electoral districts received their annual allowances, even if not re-elected in the next term.[114] Perhaps the most meaningful aspect of this proposal, prepared by the TGNA Constitutional Commission, was that it had the signatures of both radical republican Yunus Nadi Abalıoğlu, and pro-Islamic Yusuf Ziya Bey, who was executed two years later for participating in an Islamic-Kurdish rebellion.[115] In other words, deputies with opposing views could unite to protect their financial interests.

The composition of the second TGNA was different from the first after the elections, and almost all deputies were members of the same party; however, there

110 *TBMM GZC* (Gizli Zabıt Ceridesi/Confidential Minutes), 09 Mayıs 1336, 20.

111 He stated that "I do not know how to base all the phases of the action at that moment on this law". It was a very rare moment for a discourse "I do not know". *TBMM GZC* 18 Temmuz 1336, 102.

112 Nisabı Müzakere Kanunu, Law no 18 Enacted on 05.09.1920, RG: 21.02.1921/3.

113 *TBMMZC*, 17 Şubat 1337, 270.

114 *TBMMZC*, 08 Mart 1339, 72.

115 Ibid 63.

was no significant change in voting behaviour. Financial judgments were made in their favour, and the allowances were rapidly increased to 3,600 liras per year.[116] Thus, it can be seen that from 1908 to 1924, no other allowances were subject to so many laws, or increased as much. This tendency also showed itself in material terms; the dynastic palaces remained neglected since the constitutional monarchy period,[117] but the first law enacted by the TGNA in the second term was to increase its budget for the construction of a new assembly building.[118] Thus, in 1909, the budget for Parliament constituted 0.5% of the total budget,[119] but this increased to 1.1% for TGNA under the 1924 budget law.[120] The dynasty's share of 1.7% in the 1909 budget was entirely abolished in 1924.

Finally, while the 1924 Constitution was being drafted (Article 18), unlike the restrictive regulation in the 1876 Constitution, it was accepted that the parliamentary appropriations should be regulated by law, and the Assembly took the initiative in determining the appropriations legally. Thus, Feraci Efendi's constitutional amendment proposal, rejected in 1908, was implemented, and this morally-suspect legislative behaviour increased in the following years. Interestingly, as a response, a law on the postponement of the debts of the deputies to the Ministry of Finance in 1963 caused the then President Gürsel to use his veto power for the first time in Turkey. In addition, at this time, many laws that give special retirement rights to deputies, which are known to the Turkish public as *fine retirement (kıyak emeklilik)*, were also annulled by the Turkish Constitutional Court.[121]

B. Financial Privileges Arising from the Misuse of Status

Although obtaining financial benefits by using the parliamentary position may not be a cause for great concern on its own, without an assembly taking any preventive measure, it becomes a *de facto* privilege. Since the beginning of the constitutional monarchy period, it has been a matter of debate that deputies earn income illegally, as well as legally, outside the Assembly.[122]

To exemplify this fact, the first debate on the parliamentary agenda occurred in 1909, when Ebuzziya Tevfik Bey, who was also a deputy wrote an article in the *Tasviri Efkar* newspaper, accusing the deputies of profiting unfairly from bureaucrat

116 *TBMMZC*, T 2, V 6, S 128, 21.02.1924, 204.

117 Uşaklıgil, (n 43) 122.

118 Büyük Millet Meclisi Bütçesine Tahsisat İlavesine Dair Kanun, Law no 339, Enacted on 19.08.1923, *KD* (2).

119 *Osmanlı Bütçeleri* (Maliye Bakanlığı 2000) 23.

120 Muvazenei Umumiye Kanunu, Law no 490 Enacted on 20.04.1924 RG 24.05.1924/71.

121 Barış Bahçeci, *Karşılaştırmalı Hukukta ve Türkiye'de Devlet Başkanının Veto Yetkisi* (Yetkin 2008) 163.

122 Since Feraci Efendi received a salary from the Tobacco Monopolies *(Reji)* Administration and Hallaçyan Efendi was paid by the Public Debt Administration *(Duyunu Umumiye)*, it has been a matter of debate whether these jobs are compatible with his parliamentary status. *MMZC*, 02 Ağustos 1325, 440.

appointments.[123] It is understood that this problem also caused a debate within the CUP cliques. After a bitter struggle, the two groups of the CUP decided to merge again in 1911, and a protocol was enacted in which enforced the rule that 'deputies shall not follow privileges and other benefits'. Also, considering that 'some European governments before us also brought some limitations on this issue', the parties later decided to incorporate this article into the constitution.[124] It was stated that this rule aimed at preventing people from joining the CUP for personal gain.[125] However, in reality, it was known that deputies, such as Habib Bey, grew rich depending on commercial affairs.[126]

Additionally, the 1913 Congress of the CUP decided that the deputies were deemed to have resigned if they contracted with the government.[127] In this respect, several proposals to this end were presented both as a bill[128] and a constitutional amendment.[129] In 1916, one of these was supported by the CUP government, however, during the plenary session negotiations, it was returned to the commission and never discussed again.[130]

Despite this development, under the extraordinary circumstances of World War I, it became commonplace for deputies such as Simonaki Simonoğlu to contract with the government for the army's needs.[131] The point was that, while deputies were allowed to engage in trade, civil servants were prohibited by a decree,[132] and therefore, business arrangements turned into a *de facto* parliamentary privilege.

This phenomenon continued in the TGNA term and was reflected in the official minutes which record conflicts between deputies. For example, Emin Sazak who contracted for the needs of the army was accused of abusing his parliamentary status for commercial gain.[133] Celalettin Arif Bey, the vice-speaker of the Assembly, was also accused of influencing a law draft regarding a mining concession involving him and Italian partners.[134] It is also interesting to note that Hacı Bekir Sümer offered to sell wheat to the government during his discussion with the Minister of Finance.[135]

123 *MMZC*, 30 Temmuz 1325, 348.

124 Tunaya, (n 100) 100.

125 Ahmad, (n 2) 88.

126 Hüseyin Cahit Yalçın, *Tanıdıklarım* (Ötüken 2020) 216.

127 Tunaya, (n 100) 107.

128 The proposal given by İsmail Canbulat, by İsmail Mahir and Artas. MMZC, 12 Mayıs 1328, 92.

129 Rıza Bey and other proposed to amend Article 74 to this end. MMZC, 17 Kanunuevvel 1331, 259.

130 Eroğul, (n 105) 117.

131 *MMZC*, 16 Teşrinisani 1331, 47.

132 Memurînin ticaret ile iştigalden memnuiyeti hakkında kararname, *Dûstur*, V 2 (9) 02.12.1917, 737.

133 Emin Sazak was accused of pursuing personal interests by making a wood supply contract with the army. *TBMMZC*, 24 Şubat 1337, 400.

134 The point was the state of war against Italy did not end at that time. Ibid 409.

135 *TBMM GZC*, 04 Şubat 1338, 688.

All these discussions led to the submission of various proposals for banning deputies from conducting incompatible activities, but none were effective. For example, Ahmet Hamdi Bey proposed to enact a parliamentary decision regarding contracting, but the vice speaker Abdulhalim Çelebi, who chaired the session, prevented it from being put into action by asking for it to be submitted in draft form only.[136]

The following week, TGNA members were banned from acting as contractors. The bidder, Abdülgaffur Iştın argued that the deputies were reluctant to enter the tenders, also from those who were friends of ministers collect their receivables earlier than the others. However, the bid was eventually rejected after the Minister of Justice Refik Şevket İnce reminded that the members of the Ottoman Parliament had the privilege of engaging in business, and Ali Şükrü Bey argued that this ban would be circumvented by roundabout means.[137]

Another bid in the following year on the same subject was not even considered in the agenda of the plenary session.[138] Eventually, the decision taken in 1922 banning deputies from acting as a contractor was not followed up, and in the 1924 Constitution, the TGNA enacted no obstacle other than the condition that membership of the civil service was incompatible with the role of deputy. However, the issue was never fully resolved until, before the 1927 elections, Atatürk as the President of the Republic and the president of the ruling party, CHP, published a circular for the parliamentary candidates, forbidding them to enter into contractual relations with the state, and to use their influence, and stating that they would be responsible to him in this regard as the head of the party.[139]

Nevertheless, the phenomenon was above party politics. The deputies' pursuit of business interests can be observed from the official minutes. For example, in 1922 some deputies bought the flour factories in Istanbul and tried to increase profits by making efforts to increase the customs duty on imported wheat. Although these deputies were not mentioned by name, these proposals were made by Vehbi Çorakçı, of the majority (first/pro-Atatürk) group in the TGNA, and Suphi Soysallığlu, of the minority (second/anti-Atatürk) group, and after the statements of the deputies from both groups, nobody was found to have acted irresponsibly.[140]

In the second term of TGNA, a similar disclosure emerged while discussing the proposed tax amnesty for ships whose customs duty debt was unpaid. In the discussion, ruling party (CHP) member Feridun Fikri Düşünsel, defending the proposal, admitted that the shipowners were lobbying on this issue, and he was

136 Ibid 424.

137 *TBMMZC*, 23 Şubat 1338, 115.

138 *TBMMZC*, 03 Eylül 1339, 377.

139 Atatürk, (n 71) 581.

140 *TBMMZC*, 28 Şubat 1338, 546-549.

supported in the TGNA by Zeki Kadirbeyoğlu, the only deputy not a member of the ruling party at that time.[141]

Confirming the passive attitude of TGNA, Falih Rıfkı Atay, one of the journalist deputies of the time, reveals that some deputies were involved in land speculation, zoning irregularities and bank loans.[142] Another journalist deputy, Yakup Kadri Karaosmanoğlu, wrote about the influence of deputies' trade and their unethical profits in his novel *Ankara*,[143] set in the capital where wealth accumulation increasingly depended on political interests.

IV. Conclusion

Through the process of making modern Turkey, legislature played an institutional role in terms of state structuring. This process intensified after the 1908 Revolution and continued until a new constitutional order was founded in 1924. This process was not uninterrupted and was sometimes abrupt, and at other times, forced back by the opposition. The legislative body operated until 1920 as a Meclis-i Mebusan, and after that, under the name of TGNA. The political program that knocked the dynasty down manifested itself with the concepts of equality and republicanism. Such a program was a direct reaction to the financial privileges of the dynasty; in other words, its liquidation in modern Turkey largely meant the liquidation of its financial privileges.

It should be also kept in mind that the liquidation process was sometimes triggered by Sultan Abdülhamid II's absolutism and the constitutional monarchy after the 1908 Revolution. Likewise, the establishment of the TGNA was a reaction to Sultan Vahdettin's cooperation with the Allied States that occupied Turkey after World War I and his stance against national resistance. However, it is over-simplistic to explain the liquidation process of the Ottoman dynasty in terms of the two sultans' attitudes. The legislative activity in both Assemblies shows that throughout the birth of modern Turkey, a key issue was the highly-entrenched financial privileges of the Ottoman dynasty as a whole, and the demands for their abolition, which would eventually succeed.

In this process, the dynasty gradually lost its financial power via the laws which transferred dynastic assets to the state treasury, and limited dynastic appropriations. However, this process was not unopposed; during the constitutional monarchy era, with a split in the parliament, the CUP leadership, supported by the monarchist deputies, prolonged this process by blocking anti-dynastic republican demands for changes in finance. The CUP leadership motivated by benefiting from Ottoman

141 *TBMMZC*, 19 Şubat 1340, 151.

142 Falih Rıfkı Atay, *Çankaya* (Pozitif 2021) 538, 572-578.

143 His fictional character, deputy Murat Bey, became rich after the misery during the war, with works such as land speculation. Yakup Kadri Karaosmanoğlu, *Ankara* (39th ed. İletişim 2020) 106.

legitimacy, were also in harmony with the dynasty, especially during the period of the elderly and passive Sultan Reşad. This situation lasted until defeat in World War I, the liquidation of the leaders of the CUP and the dissolution of Meclis-i Mebusan by the newly ascended Sultan Vahdettin. The assembly was re-established in Ankara with the republican leadership of Atatürk replacing the CUP and was renamed TGNA, leading to the completion of the liquidation process. Under the leadership of the CUP, some deputies failed to abolish the privileges of the dynasty, and sometimes even voted in their favour. However, these same deputies voted to abolish the dynasty as TGNA members in 1924, an indicator of the change in conditions, as well as of the continuity in the process.

Having liquidated the archaic dynasty, however, the Assembly also opened the way for a new privilege status, with its differing and sometimes contradictory attitudes towards its members. From the time of the Meclis-i Mebusan, the allowances were increased by various laws by amending the Constitution, and even by unconstitutional means, to the extent that it is considered that the foundations of 'legislating in favour of themselves', were laid in this period. Also, the Assemblies could not prevent its members from engaging in commercial relations of questionable legacy. On many occasions, deputies with opposite political stances found it easy to unite around their economic interests. While it is true that parliamentary membership did not bring a permanent and inviolable status, like a dynasty, nevertheless, corruption led to an indirect financial privileged status gained from a supra partisan view, and this was left unsanctioned. No leadership had the power to block such an establishment in either the constitutional monarchy or republican eras, and it emerged as a phenomenon that became increasingly familiar in Turkey in the following years.

Thus, the fact that the financial privileges of the Ottoman dynasty were liquidated simultaneously passed into the hands of the parliamentarians and continued to exist by changing its appearance.

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RESEARCH ARTICLE

Green Is the New Black: The Rise of Green Marks and Possible Solutions to Greenwashing

Çiğdem Yatağan Özkan [*], **Berrin Dinçer Özbey** [**]

Abstract

If a popularity contest were to occur among colors nowadays, green would be the winner by far. Fast and alarming global warming has created huge and obligatory changes to consumer habits. This has put some big burdens on companies to massively change their production processes. Due to a significant percentage of consumers having changed their purchasing habits, companies are taunted with being green, and they have started greenwashing practices to take advantage of consumers' new habits without changing their corporate policies. The rise of greenwashing has caused an urgent need to protect consumers and the market. Both Turkish and foreign governments regulate certain markets such as food and agriculture and also bring certain restrictions in terms of advertisement law to eliminate deceptive images from being created in consumers' eyes. However, the gap in green marks shows the urgent need to amend the trademark law approach to protect consumers from greenwashing and to safeguard the proper functioning of the market. This work first examines the definition of green marks and ecolabels, as well as their confusing concepts, followed by present regulations regarding different legal areas. Upon this, the study then discusses the urgent need to regulate trademark law regarding green marks and makes proposals for legislation in line with recent EU regulation proposals regarding green claims.

Keywords

Trademarks, Misleading Consumers, Green Marks, Greenwashing, Ecolabels, Unfair Commercial Practices

* **Corresponding Author:** Çiğdem Yatağan Özkan (Asst. Prof. Dr.), TOBB University of Economics & Technology, Faculty of Law, Ankara Turkiye. E-mail: cyatagan@etu.edu.tr ORCID: 0000-0002-1986-703X

**Berrin Dinçer Özbey (Partner / Trademark Attorney / Mediator), Ankara, Turkiye. E-mail: berrin@kodiaklaw.com.tr ORCID: 0009-0009-2334-5603

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I. Introduction

Today's often-heard calls for balancing the ecosystem has actually been under discussion for almost 50 years. Concerns for a better and more responsible use of natural resources and producers' urgent need to comply with this approach have resulted in the birth of green marketing. The term was suggested in the late 1980s as a result of discussions that had started in the 1970s that also raised another new term: ecolabels.[1]

The fight for a better environment has a strong enemy (i.e., producers' desire for profitability), and green marketing has resultantly brought about the term greenwashing almost at the same time as it came into being. In 1980s, Jay Westerveld came up with the term when he realized the inconsistency in the behaviors of hotels that encourage its customers to use the same towel to help the environment while not even having a recycling plan.[2]

The incident Westerveld had that resulted in the birth of the term greenwashing sounds quite innocent compared to the recent cases seen on the news nowadays.[3] Greenwashing occurs so often that the term is even in dictionaries and defined as "activities by a company or an organization that are intended to make people think that it is concerned about the environment, even if its real business actually harms the environment,"[4] in addition to the definitions in academic works.[5] Regardless of whether greenwashing is a subject of litigation or a scandal, the term refers to the actions of firms that overcommit or fail to abide by promised socially responsible activities as a kind of corporate hypocrisy.[6] It can also be defined as a popular trick or tactic that deliberately overestimates the environmental benefits of a product or service, thereby misinforming and defrauding consumers about the firm's actual environmental performance.

1 Ken Pattie & Andrew Cane, 'Green Marketing: legend, myth, farce or propesy?' (2005) 8(4) Qualitative Market Research 357, 358.

2 Tiffany Derville Gallicano, 'A Critical Analysis of Greenwashing Claims' (2011) 5(3) The Public Relations Journal 1, 2.

3 For instance, in *Abraham Lizama Marc Doten et al. v. H&M Hennes & Mauritz LP* case numbered 4:22-cv-01170, H&M was accused of selling products that are not "Conscious Choice," more "sustainable," and environmentally friendly because they are not made from sustainable and environmentally friendly materials and misled consumers. Also, in *Greenpeace France et al. v. Totalenergies SE and Totalenergies Electricite Et Gaz France* case in 2022, the defendants were accused of using misleading claims such as "carbon neutral by 2050" and to play a "major role in the transition." Further case examples can be reviewed via the link. https://truthinadvertising.org/articles/companies-accused-greenwashing/

4 OxfordLearner'sDictionaries.https://www.oxfordlearnersdictionaries.com/definition/english/greenwash?q=greenwashing

5 Pascual Berrone, Andrea Fosfuri, & Liliana Gelabert, 'Does Greenwashing Pay Off? Understanding Between Environmental Actions and Environmental Legitimacy' (2017) 144(2) Journal of Business Ethics 363, 363; David Kraus, 'Green Marketing – ein Ansatz nachhaltiger Unternehmensführung aus Sicht des Marketings' (2018) 4 Erfurter Hefte Zum Angewandten Marketing 1, 33; L. Ende, M. A. Reinhard, & L. Göritz, 'Detecting Greenwashing! The Influence of Products Colour and Product Price on Consumers' Detection Accuracy of Faked Bio-fashion' (2023) 46 Journal of Consumer Policy 155, 156.

6 Ioannis Innaou/George Kassinis/Giorgos Papagiannakis "The Impact of Percieved Greenwashing on Customer Satisfaction and the Contingent Role of Capability Reputation," Journal of Business Ethics 2023, Vol 185, 333–347, 334.

The delicate status of greenwashing affects consumers' choices and has created the need for regulating environmental claims both for ecolabels and trademarks. This work aims to focus on the conceptual confusion between ecolabels and green marks, define them, find alternative solutions, and to propose regulations in order to prevent the abuse of consumers' environmental senses by way of fully enabling trademarks to perform their functions so as to indicate their origin and to inform consumers about the goods and services they provide in their scope.

II. Greenwashing and the Role of Trademarks in Addressing Environmental Awareness

A. Greenwashing and Its Effects on Consumers

Alarming news about the Earth and moreover alarming signals from it have resulted in consumers questioning their purchasing habits. Therefore, customers have very quickly welcomed sustainable products and green marks.[7] Global Sustainability Study 2022 shows 75% of consumers to believe environmental sustainability is as or more important to them then it had been the year before and 66% of consumers to consider sustainability ass one of the top five drivers behind their purchasing decisions, an increase of 16% compared to 2021.[8]

Consumers' encouraging approach to sustainably produced goods and services as well as the speed with which they've augmented their purchasing decisions have put pressure on companies. This has resulted in manufacturing and advertisement changing their habits at increased rates and expediting developments regarding ecolabels and green marks.[9]

While environmentally conscious companies make great investments to satisfy the criteria for ecolabels provided by third party verifiers in order to comply with their policies and their consumers' needs and choices for better produced products and services,[10] the use of green terms as such as eco, natural, organic, and clean as a trademark solely or in combination creates an escape for entities who do not wish to make any commitments while also creating the impression to their customers of being eco-friendly.[11] Even though verbal elements are the first thing that comes to

7 Lasse Thiele, *Systemic Accumulation and Cost Re-Externalizations in the Green Economy*, (1st ed. Freie Universitaet Berlin (Germany) ProQuest Dissertations Publishing 2020) 8.

8 Shikha Jain & Olivier Hagenbeek, '2022 Global Sustainability Study: The Growth Potential of Environmental Change' (simon-kucher.com, 23 October 2022). https://www.simon-kucher.com/en/insights/2022-global-sustainability-study-growth-potential-environmental-change

9 Ümit Alnıaçık, 'Tüketicilerin Çevreye Duyarlılığı ve Reklamlardaki Çevreci İddialar' (2009) 18 Kocaeli Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 48, 53; Abdal Ahmed, Sumera Qureshi, 'A Door To Sustainable Development' (2019) 7(8) JAC: A Journal of Composition Theory 1979, 1979; Ende, Reinhard, Göritz (n 3) 156.

10 Thiele (n 4) 62.

11 Kraus (n 3) 33.

mind when considering green signs, things such as visual elements, colors, or any other sign that can be considered as a trademark as per regulations can be used as a green mark. When evaluating whether a greenwashing effect is present, the elements that compose the trademark should be considered as a whole,[12] as well as the way in which the trademark is used regardless of the lack of any greenwashing-sounding words in it.[13] This sly profit-oriented approach has resulted in greenwashing. Indeed, companies tend to create the image of being environmentally friendly by using either green credentials or environmental claims to benefit from consumers' purchasing choices. Companies choose to invest in false PR rather than in the goods and services they provide to satisfy the requirements of being perceived as eco-friendly.[14]

While the Global Sustainability Study 2022 showed increasing numbers for sustainable consumption, it also underlined important facts that might be considered barriers, one of these being particularly important for this work is a lack of trust. Indeed, the study revealed 21% of consumers with access to sustainable products to not trust the sustainability claims made by companies and to have concerns about greenwashing.[15]

While the first thing that comes to mind when thinking about greenwashing usually involves fuel, oil, and automotive businesses being subject to lawsuits, greenwashing has also spread to almost every other single sector.[16] Recently, a world-famous clothing and retail trademark's project with the theme of recycling clothes was chased down by a Swedish newspaper that added a tracking device to the clothes they were given; the newspaper claimed that it had ended up in African countries where they were dumped and eventually burned.[17] Although greenwashing cases had started with different businesses, the fashion industry climbed up the greenwashing ladder very fast, with the 2018 research from Quantis[18] revealing the fashion industry to be one of the largest water consumption sectors and to produce 8%-10% of global CO_2

12 During the stage of examining whether similarity exists between trademarks or whether the trademark is deceptive, the elements constituting the trademark should also be evaluated as a whole. See Sabih Arkan, *Marka Hukuku I* (BTHAE 1997) 99.

13 For further information, please see Sevilay Uzunallı, *Marka Korumasının Kapsamı ve Tazminat Talebi* (Adalet Yayınevi 2012) 90.

14 Kim Sheehan, 'This Ain't Your Daddy's Greenwashing: An Assessment of the American Petroleum Institute's Power Past Impossible Campaign' (2018) Intellectual Property and Clean Energy 301, 309.

15 Shikha & Hagenbeek (n 5); Kraus, (n 3) 27 ibid 34.

16 Simon Jessop, Gloria Dickie, & Benjamin Mallet, 'Environmental groups sue TotalEnergies over climate marketing claims' (reuters.com, 3 March 2022). https://www.reuters.com/business/sustainable-business/environmental-groups-sue-totalenergies-over-climate-marketing-clyani yaims-2022-03-03/ ; Russell Hotten, 'What is Volkswagen accused of?' (bbc.com, 10 December 2015). https://www.bbc.com/news/business-34324772

17 Staffan Lindberg, 'Aftonbladet's investigation into H&M's recycling in 9 points' (aftonbladet.se, 13 June 2023). https://www.aftonbladet.se/nyheter/a/jlME1e/aftonbladet-investigation-into-h-m-s-recycling-airtags-in-items

18 Measuring Fashion, Environmental Impact of the Global Apparel and Footwear Industries Study (quantis.com, 2018). https://quantis.com/wp-content/uploads/2018/03/measuringfashion_globalimpactstudy_full-report_quantis_cwf_2018a.pdf

emissions.[19] This and other similar news people are exposed to everyday show they are right to worry about greenwashing and also the urgent need to regulate the market so as to prevent similar incidents.

B. Trademarks' Greenwashed Advertising and the Problems Arising from a Lack of Legislation

Although Turkish and foreign governments apply rather strict regulations in terms of advertisement law and unfair commercial practices regulations based on misleading claims, as well as control certain industries according to their own regulations, trademarks continue to create an escape for companies who would like to benefit from fake green claims.

When examining the current Turkish legislation in light of these trends alongside Türkiye's harmonization policy with EU legislations, some regulations are found that either directly or indirectly aim to prevent greenwashing. Türkiye has set principles to be applied to agricultural goods and inhibits the use of misleading expressions based on the Regulation on the Principles and Implementation of Organic Agriculture ("Organic Agriculture Regulation").[20] The Energy Labeling Framework Regulation was also prepared based on the Product Safety and Technical Regulations Law No. 7223 and serves as an example for labelling on energy products and services.[21] In addition, the Regulation on Commercial Advertising and Unfair Commercial Practices ("Advertising Regulation") explicitly states that advertisements cannot contain statements or images that directly or indirectly mislead consumers with regards to the product's environmental effects. As per this regulation, Turkish legislation authorizes the relevant bodies to monitor the market and prevent the spread of false environmental claims in accordance with the relevant regulations on advertisement laws, with regulatory bodies taking the initiative to guide market actors.[22] Besides these, certain regulations and general laws such as regulations on the Law On Consumer Protections[23] and the Environmental Law,[24] the Turkish Commercial Code has no up-to-date regulations for protecting consumers and other competitors on the market regarding the gap in trademark law.

19 Ende, Reinhard, & Göritz (n 3) 156.

20 *Organik Tarımın Esasları ve Uygulanmasına İlişkin Yönetmelik* [Regulation on the Principles and Implementation of Organic Agriculture], RG 18.8.2010/27676.

21 Ürün Güvenliği ve Teknik Düzenlemeler Kanunu, (*Product Safety and Technical Regulations Act*) RG 12.3.2020/31066.

22 Çevreye İlişkin Beyanlar İçeren Reklamlar Hakkında Kılavuz (*The Guideline for Environmental Claims in Advertising*), (tuketici.ticaret.gov.tr, 2023). https://tuketici.ticaret.gov.tr/data/63ada5bc13b876a1c8715f73/2023%C3%87evreye%20%C4%B0li%C5%9Fkin%20Beyanlar%20%C4%B0%C3%A7eren%20Reklaml.pdf

23 *Tüketicinin Korunması Hakkında Kanun* [Consumer Protection Act], Kanun Numarası: 6502, Kabul Tarihi:7.1.2013, RG 28.11.2013/28835.

24 *Tüketicinin Korunması Hakkında Kanun* [Consumer Protection Act], Kanun Numarası: 2871, Kabul Tarihi:9.8.1983, RG 11.8.1983/18132

The lack of legal control over trademark filings for green claims creates unfair advantages among competitors at a certain level, which also misleads consumers by effecting their purchasing decisions. Therefore, an urgent need exists for a new approach to green trademark applications, both to protect consumers as well as to set a balance among competitors. The need to regulate the market for self-declared environmental claims and green marks presents itself before consumers as trust issues.

These societal initiatives,[25] lawsuits against greenwashing,[26] alerting from non-governmental organizations (NGOs), and academic opinions have triggered the EU to re-examine and regulate self-declared claims. The fact that the Commission has declared almost half of the examined 232 active ecolabels in the EU to have either weak verifications or to lack any at all based on its preparatory studies is significant. Consumers also do not explicitly know the difference between third-party verified labels and self-certified labels.[27] Ultimately, the Green Claims Directive suggests a ban on self-certification and Member States to bear the burden of regularly monitoring the application of the Green Claims Directive.[28]

Even though several publications and discussions have occurred regarding ecolabels and the positive and negative effects of self-certification, only a few academic works have referenced green trademarks.[29]

1. Ecolabels[30]

Ecolabels are defined as signs, the essential function of which are to ensure that the goods and services bearing an ecolabel satisfy environmental standards.[31] Ecolabels are non-statutory and aim to ensure that the products or services bearing them have the potential to reduce negative environmental effects compared to the same or similar products and services on the market; what ecolabels claim must be non-deceptive,

25 Staffan Lindberg, 'Aftonbladet's investigation into H&M's recycling in 9 points' (aftonbladet.se, 13 June 2023). https://www.aftonbladet.se/nyheter/a/jlME1e/aftonbladet-investigation-into-h-m-s-recycling-airtags-in-items

26 'Companies Accused of Greenwashing-When companies green it, they better mean it' (truthindadvertising.org, 13 June 2023). https://truthinadvertising.org/articles/companies-accused-greenwashing/

27 Commission, 'Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive)' COM (2023) 166 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN

28 Green Claims Directive (n 21) prg. 1.1, 6.4 and Art. 42.

29 Wynn Heh, 'Who Certifies the Certifiers?' (2015) 16(4) Vermont Journal of Environmental Law 688,691; n 17.

30 Even though ISO recognizes and describes the fundamentals of self-declared labelling as will be discussed in the work, the authors of this article disregard self-declared labels due to their controversial status when referring to ecolabels. In this work, ecolabels will be referred to using third-party verifiers' labels only. Self-declared labels will be discussed and examined separately under heading *2.2.2 Green Marks*.

31 Kraus (n 3) 27; Jeffrey Belson, 'Ecolabels: Ownership, Use, and the Public Interest' (2012) 7(2) Journal of Intellectual Property Law & Practice 96, 96; 'Introduction to Ecolabels and Standards for Greener Products' (epa.gov 12 September 2022). https://www.epa.gov/greenerproducts/introduction-ecolabels-and-standards-greener-products#:~:text=standards%20and%20ecolabels-,What%20is%20an%20ecolabel%3F,therefore%20deemed%20%E2%80%9Cenvironmentally%20preferable%E2%80%9D

accurate, and grounded on scientific information.[32]

Ecolabels function to inform consumers of products' quality and sustainability, and consumers' positive approach to eco-friendly trademarks also motivates manufacturers to use them due to the rather strong effect they have on consumers in determining or at least influencing their purchasing habits.[33] Because ecolabels are aimed at providing accurate information to consumers based on companies' commitments or contributions in favor of the ecosystem, the first important question involves understanding who grants these companies the right to use these signs. Currently, they are awarded by either governmental bodies, nonprofit environmental advocacy organizations, or private sector entities.[34]

The second question arises as to how they are granted. An entity may be willing to use an ecolabel and may be ready to commit to changing its activities, but understanding what kind of impacts will be evaluated as an environmental impact is still important. The answer to this question lies in the principles of a life-cycle analysis (LCA).[35] LCA, also known as a cradle-to-grave analysis, is a methodology for determining how much a product affects the environment over its lifetime and for increasing resource use efficiency while decreasing liabilities.[36] LCA assesses the identification and quantification of relevant environmental loads such as the energy or amount of raw materials consumed, their potential environmental impacts, and the alternative options for reducing these impacts.[37]

Currently, different classifications are found regarding ecolabelling that are based on different standards, while the evaluative aspects of LCA have been categorized by the International Standards Organization (ISO).[38] The current edition of ISO 14024:2018[39] refers to the Type I labelling program as a multiple criteria-based, third-party program where they have the authorization to award a license for use on relevant goods and services.[40] On the other hand, ISO 14021:2016 describes Type II labelling and sets out the requirements for environmental claims that are self-declared (i.e., claims that are made by producers, importers, distributors, or anyone likely to benefit

32 Council Regulation (EC) 1980/2000 of 17 July 2000 on a revised Community eco-label award scheme [2000] OJ L237/1 art 1.

33 Jeffrey Belson, 'Environmental Trademarks' (2014) 104(3) The Trademark Reporter 822, 822.

34 Belson, 'Ecolabels' (n 25) 98.

35 *Ibid*.

36 Life Cycle Assessment, see https://www.eea.europa.eu/help/glossary/eea-glossary/life-cycle-assessment

37 Life Cycle Assessment (n 30).

38 Belson, 'Ecolabels' (n 25) 98; Miroslav Rusko, Anton Koraus, 'Type I, II and III of Ecolabels' (2013) 2(1) Journal of Environmental Protection, Safety, Education and Management 1, 2.

39 'ISO 14024:1999 Environmental labels and declarations — Type I environmental labelling — Principles and procedures' (iso.org, March 1999). https://www.iso.org/standard/23145.html

40 'ISO 14024:2018(en), Environmental labels and declarations — Type I environmental labelling — Principles and procedures' (iso.org, February 2018). See Art. 3.1 at https://www.iso.org/standard/72458.html#:~:text=ISO%20 14024%3A2018%20establishes%20the,for%20assessing%20and%20demonstrating%20compliance

from such claims) and include symbols, signs, and declarations such as compostable, recyclable, and refillable.[41] These labels can be used without certification provided that they are precise, verifiable, and specific to the environmental aspect of the subject and that they take the important aspects of the product's life cycle into account.[42] Lastly, ISO 14025:2006 describes Type III labelling as the declarations provided by one or several organizations that are based on either independently verified full life cycle assessment data, life cycle inventory analyses data, information modules according to the relevant ISO standards, or additional environmental information where relevant.[43]

Blauer Engel [Blue Angel] is the mother of ecolabelling and was established through an initiative from Germany's Federal Ministry of the Interior as a resolution taken by the environmental ministers of German federal states.[44] Other examples of signs managed by the governmental bodies are the European Union's official ecolabel EU Flower, which is awarded to enterprises by the European Commission and Member States based on the criteria set forth in the Strategic Working Plan for the EU Ecolabel,[45] as well as ecolabels such as Energy Star, Safer Choice, and SmartWay as run by the US Environmental Protection Agency.[46] On the other hand, well-known examples of ecolabels managed by non-profit organizations include the Rainforest Alliance,[47] which is managed by the NGO with the same name, and Leaping Bunny, which is run by nine organizations.[48] Home Depot's EcoAction is also a good example of private sector's role in ecolabelling.[49]

For harmonizing with EU regulations and regulating ecolabels in line with the questions mentioned above, Türkiye has taken steps to improve ecolabelling culture and also has NGOs such as Ecocert for obtaining certification for goods and services.[50] Within the framework of the harmonization process with the European Union in Türkiye, the Ministry of Environment and Urbanization initiated the Türkiye National Environmental Labeling Infrastructure Project. The Environmental

41 'ISO 14021:2016(en) Environmental labels and declarations — Self-declared environmental claims (Type II environmental labelling)' (March 2016). See art 3; (n 24) at https://www.iso.org/standard/66652.html.

42 Rusko, Koraus (n 32) 5.

43 'ISO 14025:2006(en) Environmental labels and declarations — Type III environmental declarations — Principles and procedures' (July 2006). https://www.iso.org/standard/38131.html

44 Fabio Iraldo, Rainer Griesshammer, & Walter Kahlenborn, 'The Future of Ecolables' (2020) 25 The International Journal of Life Cycle Assessment 833, 833; 'Ecolabel with history'. https://www.blauer-engel.de/en/blue-angel/our-label-environment/eco-label-history

45 European Commision Directorate General Environement Circular Economy, Sustainable Production and Consumption 'Strategic EU Eco-label, Work Plan 2020 w– 2024' 2020, 3. https://ec.europa.eu/environment/ecolabel/documents/EU%20Ecolabel%20Work%20plan%202020-2024%20Dec%202020.pdf

46 'Buying Green for Consumers'. https://www.epa.gov/greenerproducts/buying-green-consumers

47 'Rainforest Alliance'. https://www.rainforest-alliance.org/

48 'Eco-label index'. https://www.ecolabelindex.com/

49 Belson, 'Ecolabels' (n 25) 96.

50 Stratejik Çevresel Değerlendirme Yönetmeliği (*Regulation on Strategic Environmental Assessment*) RG 8.4.2017/30032.

Product Declaration (EPD) System was also established in 2012.[51] In accordance with the Regulation on Environmental Labeling[52] that entered into force in 2018, the Türkiye Environmental Labeling ecolabel was established under the management and coordination of the Ministry of Environment, Urbanization and Climate Change of the Republic of Türkiye. In parallel with the European Green Deal, the Ministry of Trade of the Republic of Türkiye also published the Green Deal Action Plan[53] in 2021 with the aim of popularizing the Turkish Environmental Labeling System.

While the important questions of who and how have been answered, the instability and unreliability of self-declared claims and green marks remain the same. Ecolabels can only be used by producers with a license or other similar authorization.[54] However, Type II certification does not require a certificate, and the standards set by ISO or noted under LCA can be interpreted broadly. In this study's opinion, this cannot be considered a standard for ecolabels. The difference between ecolabels and green marks is the necessity for proving the criteria set by the verifier have been satisfied. As this does not exist in the Type II ecolabels, they more resemble green marks as they have no control over self-declared ecolabels, thus further blurring the difference between green marks and ecolabels.

2. Green Marks

Unlike ecolabels, green marks have no explicit description and therefore its definition rather stays in a grey area despite containing the term green. The Trademark Trial and Appeal Board of the United States Patent and Trademark Office has explained the term "green" to mean "anything environmentally friendly" while evaluating exclusivity of trademarks, a different aspect of the matter.[55]

While one way to use such claims is to use a self-labelling system as described under ISO 14021 standards without registration, another and also very popular way to be able to use it on products is to file a trademark application for their registration with the relevant national intellectual property authority.

Indeed, the rise of environmental awareness among consumers has led some producers to file trademark applications with green connotations.[56] Not set wording

51 Göknur Şişman Aydın, 'Eko-Etiketleme ve Türkiye Çevre Etiketi' (2019) 4(1) Harran Üniversitesi Mühendislik Dergisi, 40, 45; Mehmet Emin Birpınar, Serkan Atay, & Ülkü Yetiş, 'Sürdürülebilir Üretim ve Tüketimde Eko-Etiketlerin Önemi: Türkiye Çevre Etiket Sistemi' (2023) 3 Çevre Şehir ve İklim Dergisi 60, 73.

52 Çevre Etiketi Yönetmeliği (Eco-Label Regulations) RG 19.10.2018/30570.

53 'Yeşil Mutabakat Eylem Planı ve Yeşil Mutabakat Çalışma Grubu 2022 Faaliyet Raporu' (*Green Deal Action Plan and Green Deal Working Group 2022 Annual Report*) (ticaret.gov.tr 2022). https://ticaret.gov.tr/data/643ffd6a13b8767b208ca8e4/YMEP%202022%20Faaliyet%20Raporu.pdf

54 Belson 'Ecolabels' (n 25) 100.

55 Hetu and Kramer 2.

56 Belson 'Environmental' (n 27) 822.

exists for a trademark application to be considered green; however, trademark owners do commonly use words such as green, eco, clean, and naturally to promote their goods and services to consumers as being environmentally friendly. As of 2023, 2,638 trademark filings starting with the term eco had either been registered or are pending registration before the Turkish Patent and Trademark Office (TPTO), while this number is 4,066 for filings including the term green, 8,361 for bio, 1,320 for organic, and 3,174 for natural. The terms should also be noted to be able to be used in different languages as well, with 2,442 filings including the Turkish term *organik* [organic] and 5,028 filings including the Turkish term *doğal* [natural].[57] The list can be made even longer, as many other words are found referring to being green. Even this short basic search reveals the presence of over 27,000 trademarks with green claims just for verbal elements only, and this raises the question of whether or not these trademarks keep their word at being environmentally conscious.

Such vague and unclear statuses on self-declared labels and green marks form the need for controlling and clarifying green claims to prevent misleading consumers' choices.[58] Making similar points, the European Commission published the Green Claims Directive on March 22, 2023, a proposal for ensuring consumer protection and empowering their contribution to green transition in line with the 2022 proposition to update the Union Consumer Law.

As self-certification becomes an emerging issue to be regulated in order to protect consumer rights and the environment, as well as to balance competition among producers, this will also surely warm up the status of the green marks.

3. The Importance of Controlling Green Marks and How It Should Be Done

The essential and historically first function of trademarks is to distinguish one enterprise's goods and services from those of another. However, the advertising function of trademarks has become prominent these days, and although no legal obligation exists, trademarks have become signs guaranteeing the quality of offered goods or services in the eyes of consumers.[59] Such functions serve the favor of both consumers and trademark owners.[60] While trademarks indicate the origin and let consumers link the product with the producer and a known expected quality, they

57 *Türk Patent ve Marka Kurumu Çevrimiçi Arama Motoru* [Online Trademark Search Tool of the Turkish Patent and Trademark Office] (turkpatent.gov.tr, August 2023). https://www.turkpatent.gov.tr/arastirma-yap?form=trademark

58 Heh (n 23) 691.

59 Rıza Ayhan, Hayrettin Çağlar, Burçak Yıldız, & Dilek İmirlioğlu, *Sınai Mülkiyet Hukuku* (Adalet 2021) 46.
The guaranteed function of a trademark, which means that a good or service has certain qualities and is produced in such a way as to preserve these qualities, is not a legal obligation, but has great economic importance. See Arkan 'Marka' 39; Ünal Tekinalp, *Fikri Mülkiyet Hukuku* (Vedat 2012) (n 59) 378.

60 Heh (n 23) 692.

also help the trademark owners maintain their reputation and gain a loyal customer profile.[61]

When considering the fact that green marks claim a sensible approach to the environment, how they split off into trademark subgroups (i.e., ordinary trademarks, certification marks, or collective marks) should be examined carefully.

4. Ecolabels and Their Status as a Trademark

The story of *Blauer Engel* was established shows that, while NGOs first introduced the world to ecolabels, governments adapted themselves to the idea very quickly and started using the same labelling system.[62] Recently, both NGOs and governmental bodies have been found working as third-party verifiers and owners of certain ecolabels. While no obligation exists to register an ecolabel through the relevant registry offices,[63] the question still arises as to what their nature was when they registered.

The first thing to come to mind is certification marks resulting from ecolabels being a means to an end.[64] Several enterprises use certification marks under the control of a trademark owner to guarantee common characteristics, production methods, geographical origin, and quality of goods or services. Under the Turkish trademark law system, a certification mark can be used by anybody without needing to obtain a license, provided they act in line with the technical specifications.[65] The governmental and private organizations owning these marks have registrations for them such as EU Flower and Energy Star.[66] Indeed, the proprietors of such marks cannot use their trademark; they instead determine the conditions to be met by the producers, examine producers' applications to determine if they've satisfied the criteria, and then give them the right to use the relevant signs.[67] In the event that the owner of a certification mark fails to carry out the necessary checks regarding the use of the trademark and remains silent about the use of a mark by unauthorized persons, the certification mark may be revoked for being deceptive.[68]

61 Arkan 'Marka' (n 53) 39; Tekinalp (n 59) 378; David Bainbridge, *Intellectual Property* (9th ed. Pearson 2012) 753'The Principle of Uniqueness of Trademark Owner and the Examination of This Principle in the Context of Its Transfer (an Assessment in Context of the Decision of the Constitutional Court That Cancelled the Article 16/5 of the Decree No. 556)' (2016) 1 YBHD 229, 238; Heh (n 23) 693; Kraus (n 3) 22.

62 Gabriele Engels & Ulrike Grubler, 'Sustainable Brands, Eco-Labels and the New EU Certification Mark', (2017) 264 Managing Intellectual Property 88, 91.

63 Engels & Gruber (n 56) 90.

64 Belson 'Ecolabels' (n 25) 102.

65 Sabih Arkan, 'Marka Tescil Başvurusunun Lisans Sözleşmesine Konu Olması – Bazı Sorunlar' (2019) 35(3) Banka ve Ticaret Hukuku Dergisi 39, 40.

66 Belson 'Ecolabels' (n 25) 99.

67 Belson 'Ecolabels' (n 25) 100; Arkan 'Marka' (n 53) 47; Aslan Kaya, *Marka Hukuku* (Arıkan 2006) 54; Ayhan Çağlar Yıldız İmirlioğlu (n 53) 46.

68 Please see Industrial Prpoerty Code Art. 26 Para. 1-c and IPC Art. 5 Para.1-f: "Absolute grounds for refusal in trade mark registration: Signs that will mislead the public about the nature, quality or geographical origin of the goods or services

Although certification marks represent a good fit for ecolabels, some countries are found to not cover certification marks under their legislations, and other countries choose not to implement the certification mark regulations for these signs despite having the provisions.[69] In these circumstances, collective marks[70] stand as an alternative option for covering ecolabels as registered marks because their definition also provides the ability to serve as a certifier for the goods and services of the members of the proprietor's association, in addition to the association also setting the standards to be met to be able to use their mark.[71] When considering the natural fit of certification marks to ecolabels and their present regulation under the Turkish legal system, certification marks stand as the best option to be applied to ecolabels if they desire to be registered.

5. Green Marks: Non-Distinctive, Deceptive, or Both?

Unlike ecolabels, green marks can be filed by anybody as an ordinary trademark. Although both ordinary trademarks and certification marks are related to quality perceptions, certification marks function in this respect rather strictly and statutorily.[72]

While governments and NGOs are working hard on ecolabels to set a standard that primarily protects consumers and provides them with a stable market, registering green trademarks carries a risk of wasting these efforts, as doing so allows trademark owners to cuts corners for using green signs on goods and services and even enforcing these signs over third parties.[73] The fact that a trademark can be registered without submitting any further document provided that it is in line with the trademark regulation of the relevant country can result in having a green claim become a registered trademark without actually doing anything green.[74] Therefore, checking the registry records for trademarks that claim to be green but that have failed to realize being green is important. In order to be able to do this, green marks need to be divided into two subgroups and examined, one being the signs consisting of green claims only, and the second being the trademarks bearing a green claim with another trademark element.

Registering solely as a green mark raises a question as to the presence of distinctiveness.[75] Indeed, Article 5/1(b) of the Intellectual Property Code (IPC) sets

69 Engels & Gruber (n 56) 91.

70 Under Art. 31 of the IPC, collective mark is defined as "a sign used by a group of manufacturing or trading or service enterprises". For further information, please see Bainbridge (n 55) 754; Arkan 'Marka' (n 53) 45; Kaya (n 61) p.55; Ayhan Çağlar Yıldız İmirlioğlu (n 53) 39; Tekinalp (n 44 45) 372.

71 Belson 'Ecolabels' (n 25). 103

72 Alexandra Mogyoros, 'Improving eco-labels: are green certification marks up to the task?' (2023) 18(5) Journal of Intellectual Property Law & Practice 367, 368.

73 Mogyoros (n 66) 368.

74 Mogyoros (n 66) 370.

75 Thomas Watson, 'Green Marketing: It's not All Bunnies and Flowers' (2010) 27(6) Intellectual Property Law 34, 35;

ex-officio refusal of a sign that has no distinctiveness, while Article 5/1(c) regulates the refusal of signs that have a descriptive nature in commerce or that define the source or qualification of a product or service. In order to be able to talk about the possibility of misleading the consumer, the trademark must contain false information that is objectively suitable for misleading, and the element of misleadingness should be evaluated in terms of the consumer group that the goods and services used by the trademark address.[76] Research clearly reveals that green marks obviously have this feature.[77]

TPTO's approach to the descriptive and/or non-distinctive nature of green marks that solely involve a green verbal claim is rather stable, and the signs are rejected based on these *ex-officio* grounds when they are directly linked to their aim. A short search through the online TPTO's database for trademarks consisting of *organik* [organic] reveals five trademark applications have been rejected either completely or just for the relevant goods/services based on the classification scope of the applications due to being descriptive for these goods and/or services. TPTO rejected another 19 trademark applications containing the term *doğal* [natural] and one application for *ekolojik* [ecological]. However, when searching for trademarks containing the term eco, 14 of the 27 trademark applications had been rejected; the reason for most of them being rejected had occurred on grounds other than a descriptive nature or lack of distinctiveness. In addition, the term *yeşil* [green] had been subject to 22 filings, of which only 10 were deemed invalid, with the reasoning being the same as in the *organik, doğal* and *ekolojik* filings.

While the search for green marks can be extended, their outcome will be the same. Wven though TPTO has a rather stable approach to green trademarks only consisting of this green term with no distinctive element, TPTO has no settled approach to other terms that can be interpreted as green. The fact that green marks have no established terminology or settled rule regarding intellectual property offices' approaches to these kinds of marks results in different decisions to the same kind of filings. The changes in consumers' and producers' approach to environmentally friendly goods has also been reflected in language, which is also alive and changing, and some terms have gained additional importance. For instance, *Yeşil* has been a registered trademark for shoes in Nice Class 25 since 1990, and the experts who examined the application back then had not considered *yeşil* to be a trademark that could eventually lead to a green claim. Despite *Yeşil* simply being the surname of the authorized person of the applicant company in the referred trademark, its impression as a word has changed

Jennifer M. Hetu & Anessa Owen Kramer, 'It's Not Easy Being Green: Use of the Terms Organic, Sustainable, and Natural in Trademarks and Advertising' (2011) 4(1) Landslide 46, 46; Belson 'Ecolabels' (n 25) 101.

76 Sevilay Uzunallı, *Avrupa Birliği'ne Uyum Sürecinde Markanın Köken Ayırt Etme İşlevi ile Bağlantılı Kavramların Yorumu 'Köken Ayırt Etme'* (Çağa 2008) 128–129.

77 Please see Section 2.2.

among consumers since its registration date. Therefore, previously registered trademarks may pose the risk of being deceptive after a certain time.

The example trademark searches mentioned above were based on verbal elements only, as the online database of the Office does not have a search tool for colors or other signs seeking to be registered as trademarks. Still, a trademark can undoubtedly create the impact of being green throughout its colors, logo, other visual elements, or any other sign that can be registered as a trademark, even if the verbal elements contain no green claims. Therefore, the overall impression of a sign needs to be reviewed when determining the applicant's intention to register it as a green mark or not, and this should be done by including but not being limited to verbal elements. While trademark applications solely consisting of green signs may face the problem of being descriptive or of lacking distinctive character, the more important and mostly disregarded problem remains in their deceptiveness, both for those trying to register solely as well as those trying to register with another distinctive element. Just like in ecolabels, deceptiveness can be another valid ground for refusal of trademark applications *ex-officio*, provided that they mislead the public about the nature, quality, or geographical origin of the goods or services or other revocable grounds. This raises the question as to whether the tens of thousands trademark applications filed before TPTO with green claims in one way or another have in fact kept their word at being environmentally responsible or not. Although most of them have been examined and rejected based on their deceptive nature, obviously not all of them were rejected.

TPTO's 2021 Guideline[78] on Examination of Trademarks Based on Article 5 of IPC No. 6769 (the 2021 Guideline) stated how *ex-officio* refusal regulations are to be applied to the trademark applications by also giving examples. The 2021 Guideline stipulates a two-staged examination in terms of the deceptiveness examination and seeks answers to two questions. The TPTO first answers whether or not the application includes a deceptive or misleading term regarding the nature, quality, or geographical origin of the goods or services. A positive answer raises the second question of whether the targeted consumers may in fact be misled because of the term/sign or not.[79]

Although the explanations in the 2021 Guideline seem fitting for signs with green claims, it has yet to solve the problem, as the TPTO justifiably seeks answers to these queries based on the signs and the goods and/or services listed in their scope. For instance, TPTO considers the trademark application "Chicken Deluxe Sandwich Crunchy" as deceptive for the goods "sandwiches with meat, sandwiches with pork, and sandwiches with fish," because the term chicken in the application directly

78 Turkish Trademark and Patent Office, *Marka İnceleme Kılavuzu* [Trademark Examination Guideline], (turkpatent.gov.tr, August 2023) https://www.turkpatent.gov.tr/duyurular/marka-inceleme-kilavuzu-guncellendi-18082021

79 Trademark Examination Guideline (n 71) 305.

creates the impression of the goods in its scope to be made of chicken while actually covering other type of products.[80] Because Turkish trademark law does not require any supporting documents to be submitted when filing a green trademark, the 2021 Guideline narrowly interprets the grounds for refusal for green marks and rejects applications provided the goods and/or services listed in their scope include goods and/or services that can be directly understood from the wording to be environmentally unfriendly.

6. Alternative Courses of Action to End Greenwashing and Protect Consumers

Registering a green mark benefits from a gap in trademark legislation, as this provides the trademark owner legitimate grounds to use the term on its offered goods and/or services without requiring to any documented proof about being green and results misleading consumers. The EU, the US, and Türkiye have all attempted to overcome the negative effects of such uses on consumers by regulating certain markets for the use of green marks and by preventing their use in advertisements.

In Türkiye, Organic Agriculture Code No. 9085 and the Organic Agriculture Regulation set the principles and conditions of organic agriculture and also monitor producers through the Ministry of Food, Agriculture and Livestock as well as organizations authorized by the same Ministry. They can administer both administrative fines and other sanctions to producers who act counter to these regulations. This affects the aspect of trademark law regarding actual use. Indeed, a trademark owner who registers a trademark containing the term organic cannot use it for goods that are not produced in line with these regulations. However, this is a very limited area, and the rest of the trademark filings in other sectors with green claims remain unattended as they are not covered within the scope of these regulations.

The common points between trademark law and advertising law are to inform consumers correctly, to prevent them from being misled, to not include deceptive elements in trademarks, and to prevent unfair gain and thus unfair competition.[81] As a result, another aspect of advertising law is to protect consumers and other competitors. Article 17 of the Advertising Regulation[82] stipulates that advertisements cannot be made in a manner that exploits consumers' environmental sensitivity or possible lack of knowledge in this area and that environmental signs, symbols, and

80 Trademark Examination Guideline, (n 71) 306.

81 İlhan Kara, *Tüketici Hukuku,* (Engin, 2015) 195; Yılmaz Aslan, *Tüketici Hukuku Dersleri* (Ekin 2021) 81; Aydın Zevkliler/ Çağlar Özel, *Tüketicinin Korunması Hukuku* (Seçkin 2016) 419; Elif Eşiyok, 'Türkiye'de Reklamların Denetimi: Reklam Kurulu Kararları Üzerinden Bir İnceleme' (2018) 9/2 İnönü Üniversitesi Hukuk Fakültesi Dergisi 593, 594.

82 RG 10.01.2015/29232. The provision in this regulation to protect consumers even exceeds the harmonization aim as the reference EU Directive No. 2005/29 does not contain the wording "environmental effect" in the relevant clause. For further explanation, please see Alper Çağlar Koyuncu, *Tüketici Hukuku Çerçevesinde Haksız Ticari Uygulamalar* (Seçkin Yayıncılık, 2022) 80.

approvals cannot be used in a deceptive manner.[83] The exploitation of environmental sensitivity is subject to administrative sanctions such as broadcast suspension, publishing a correction, or administrative fine within the context of the provisions of the Law on Consumer Protection and the Turkish Commercial Code (TCC) on unfair competition.[84] The aforementioned acts are clear examples of unfair competition and are regulated under Article 55/ Paras.1-a and 2 of the TCC regarding behaviors and commercial practices contrary to the rule of good faith as "making untrue or misleading statements about itself, its commercial enterprise, business signs, goods, work products, activities, [*sic*] and business relations, or putting a third party ahead of the competition by the same means." This allows the legal and criminal liability provisions regarding unfair competition to be applied.[85] In addition, consumers are able to apply to the relevant authorities or courts for elective rights arising from defective goods or services and to claim compensation.[86] The recent Guidelines for Environmental Claims in Advertising[87] (the Advertising Guidelines) was prepared based on the Advertising Regulation and the decision rendered in the Advertising Board's meeting in December 2022. The Advertising Guidelines define environmental claims as statements or images in a commercial advertisement or commercial practice that communicate the components, method of production, supply chain, use, or disposal of the goods or services in question provide environmental benefits or do not cause adverse environmental impacts.

Among other decisions, the Advertising Board decided to cease the commercials for hygienic products from a company based on the facts that the environmental claims used in the commercials (e.g., breaks down in soil, breaks down in nature, protects the atmosphere, and helps reduce carbon dioxide emissions with its biopolymer content) could not be proven through comprehensive evidence in line with the advertising regulations and that such claims mislead consumers and abuse their sensitivity regarding the environment or probable lack of knowledge on the subject matter.[88]

83 For further detailed explanations on environmental advertising, please see Kara, 197; Aslan, 81; Zevkliler & Özel, 433; Esin Gürbüz Güngör, 'Tüketicilerin Çevre Konusundaki Duyarlılığına Yönelik Reklamların Hukuki Açıdan İncelenmesi' (2021) 12(1) Ege Stratejik Araştırmalar Dergisi 21, 26.

84 For administrative sanctions please see Law on Consumer Protection Art. 61, 62, and 77 Para.12.

85 For civil liability please see Turkish Commercial Code Art. 56; for criminal liability please also see Turkish Commercial Code Art. 62. For further detailed explanations on Art. 55 Paras. 1-a and 2, please see Sevilay Uzunallı, *Haksız Rekabet Hukuku,* (Oniki Levha, 2016) 150–151.

86 Please see Law on Consumer Protection Art. 11 and Turkish Code of Obligations Art. 227.

87 Turkish Republic Ministry of Trade, *Çevreye İlişkin Beyanlar İçeren Reklamlar Hakkında Kılavuz* [Guideline for Environmental Claims in Advertising] (tüketici.ticaret.gov.tr, August 2023). https://tuketici.ticaret.gov.tr/data/63ada5bc13b876a1c8715f73/2023Çevreye%20İlişkin%20Beyanlar%20İçeren%20Reklaml.pdf

88 For the Advertising Board's Decision No. 2023/107 dated June 13, 2023, the full text can be accessed here: https://ticaret.gov.tr/tuketici/ticari-reklamlar/reklam-kurulu-kararlari
For other decisions from the Advertising Boards, please see Gürbüz Güngör (n 75) 43.

The approach has been the same in the USA and the UK. Forty cases have appeared before the National Advertising Division (i.e., the ad industry's self-regulatory body in the US), the Federal Trade Commission (FTC; the US consumer protection agency), or Advertising Standards Authority (ASA) in the UK, and an additional 23 cases appeared in the first half of 2023.[89]

Türkiye's Advertising Board has a strict approach to environmental claims and aims to protect consumers in the most comprehensive manner. In order to count a greenwashing act as successful, it has to mislead consumers by creating the fake image of being eco-friendly while having no substantial grounds in reality.[90] Nevertheless, the decisions on advertisements are rendered individually and do not affect the status of trademarks.

C. An Alternative Solution to the Current Status of Green Marks

The number of green marks both before the TPTO and foreign trademark offices show the urgency for regulating trademark law to cover this gap. Even though the drafted Green Claims Directive aims to regulate the market for ecolabels, it shows the EU's approach to self-declared claims, and the EU seems to be sitting on the fence in the battle of self-declared trademarks and misleading consumers. Surveys show that more than half of products released to the market with green claims are either vague, misleading, or contain unfounded information.[91]

Banning self-declared labelling is a hugely important step that has even been marked under the Green Claims Directive by noting the expected direct and indirect administrative costs for managing and operating labels.[92] Even though these references on the Green Claims Directive only relate to ecolabels and self-declared labels, national or international authorities cannot consider the aim of this proposal to be beyond the problems in trademark registries. The Green Claims Directive proposes the establishment of verifiers for ecolabels, and these verifiers must be an officially accredited independent body with no conflicts of interest so as to ensure the independent and professional examination and judgment of cases.[93] The burden to monitor enforcement of the Green Claims Directive is also explicitly placed on the member states.[94]

89 'Companies Accused of Greenwashing-When companies green it, they better mean it' (truthindadvertising.org, 13 June 2023). https://truthinadvertising.org/articles/companies-accused-greenwashing

90 Ende, Reinhard, & Göritz (n 3) 156.

91 Green Claims Directive (n 21) 3.

92 Green Claims Directive (n 21). 15.

93 Green Claims Directive (n 21). 23.

94 Green Claims Directive (n 21) Art. 20.

Having Türkiye follow the process of this Green Claims Directive and its possible effect and adapt it to the country's legal system are important, as Türkiye is in the process of harmonization with EU regulations and trademark regulations for this subject matter specifically. Harmonizing the law may result in banning self-declared labelling, in introducing a set structured process for providing ecolabels, and in cleaning the TPTO's registry records by purging deceptive green trademarks, and these should also be taken into consideration. In order to prevent the "registration of misleading marks in terms of the nature and quality of the goods or services" under Article 5 Para. 1-f of the IPC, this study is of the opinion that applicants who apply for green marks should be able to provide a document that states the mark is not misleading. In this context, Article 11 Para. 1-d of the IPC regarding the documents to be submitted in the trademark application should be amended, and the obligation to use an accredited certification mark (ecolabel) should be introduced with regard to green marks. The obligation should be stipulated for submitting a document stating that the goods or services for which the green mark is used have been produced in accordance with the technical specifications of the certification mark or that they have the capacity to be produced in this way for goods or services that have not yet been placed on the market. Again, Article 15 regarding the Authority's power of examination should be amended and the effects a lack of documentation has on the application should be regulated and clarified. As is the case in the current legislation regarding deceptiveness, the trademark application should enjoy its original application date provided that it can prove relevant documents in due time. Detailed explanations should be provided in the Trademark Application Guide in order to prevent confusion among applicants. With an amendment to the legislation, a transitional provision should be introduced, and a timetable should be set for filing documents with the TPTO for potentially misleading green marks; trademarks for which documents are not filed should be cancelled upon the request of the relevant persons pursuant to Article 26 Para. 1-c of the IPC.

TPTO does not employ technical personnel to evaluate whether submitted documents regarding the non-deceptive nature of the green mark reflect the truth or not. Therefore, collaboration needs to be established between TPTO and the Ministry of Environment,[95] which conducts the ecolabel evaluations in Türkiye. In fact, the obligation in Article 13 of the Green Claims Directive imposed on member states to make a relevant regulation is an indication of this. In this context, the IPC needs to be amended, as well as the relevant legislation, to ensure interinstitutional cooperation. If necessary, new units may also need to be established within institutions. In line with Article 16 Para. 1 of the Green Claims Directive, establishing a substantiated complaint mechanism before the competent authorities based on objective circumstances to be filed by persons with legitimate interests is also necessary for

95 Please see section 2.2.1

investigating an applicant's failure to comply with regulations.

After amending the legislation, however, the green marks registered as non-deceptive pursuant to Article 5 Para. 1-f of the IPC should be considered for redocumentation at regular intervals regarding their continued use in accordance with the technical regulation on the ecolabel qualifying the product or service. In this regard, Article 14 Paras. 8–9 of the Environmental Labeling Regulation may be taken as an example in our opinion. According to this provision, the use of the Turkish Environmental Label is granted for a period of 4 years; if requested 180 days before the expiration of the term, the Ministry may extend the term once it has evaluated the technical review commission. Because the user of the environmental label can use it as long as it complies with the criteria of the product or service group permitted for use, when renewing the criteria, the user of the environmental label is given a transition period of 6 months to comply with the new criteria and is expected to prove that production has been made in compliance with the new criteria within this period. In this context, one may suggest to include a provision stipulating that the owner of the green marks who uses the environmental label must also submit the relevant documents to the Authority and that the trademark may be canceled in case of failure to submit the document.

Considering the natural fit of ecolabels as certification marks, TPTO's database should be cleaned regarding green marks unless they can prove their claims with concrete evidence. This will surely create administrative costs and a workload considering the high number of applications that have been filed.[96] Still, this seems to be the best possible option for protecting consumers in the current volley of green claims to which they are exposed.

III. Conclusion

As a result of the development of environmental consciousness, consumers' as well as companies' appetites toward eco-friendly goods and services have grown. While satisfying this appetite has been positive both for the Earth and consumers, having this be done without trickery is vital. Trademark law is one of the most important barriers to preventing this approach of trickery and ensuring that consumers in fact purchase something that is actually a green product when they encounter a trademark or label making that claim. Companies investing huge amounts of money to make their manufacturing process and released goods and/or services green should also be in a favorable position among other companies. This can only be provided if companies that greenwash are exposed and the market is regulated equally for all companies that claim to be eco-friendly. This will surely take some time, as it requires

96 Such a risk is also recognized in the Green Claim Directive and even points to the need for a Union-wide regulation to reduce these costs for SMEs. For further explanations, please see Green Claims Directive (n 21) 13, 14, 15.

certain legislative and administrative works, and this requirement is undoubtedly in line with the EU's Green Claims Directive; however, the results will be worthwhile, as this will protect consumers, set a fair competitive environment for producers, and last but not least, will eventually help nature by reducing the harm associated with uncontrolled consumption.

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RESEARCH ARTICLE

Une étude sur les arrhes (au sens de l'art. 177 du COT), le dédit reel (l'art. 178 du COT) et la peine résolutoire (le dernier alinéa de l'art. 179 du COT)

Efe Can Yıldırır *

Résumé

Dans la vie quotidienne comme dans la vie commerciale, il arrive fréquemment que les parties exécutent ou s'engagent à exécuter certaines prestations afin de prouver le contrat qu'elles ont établi et parfois de se débarrasser des engagements qu'elles ont pris. Compte tenu de cette situation, le législateur, prenant en considération l'importance de ces habitudes séculaires, a introduit dans le Code turc des obligations des dispositions relatives aux arrhes, au dédit réel et à la peine résolutoire et y a attaché certaines conséquences juridiques. Cette étude vise à analyser chacun de ces concepts séparément en termes de théorie et de pratique. Dans le premier chapitre, les arrhes seront analysées du point de vue de sa nature, de sa fonction, de son sort en cas d'exécution ou d'inexécution de l'obligation de prestation principale, et de l'application ou non du dernier alinéa de l'art. 182 COT concernant la réduction de la clause pénale. Les dispositions du Code civil allemand concernant les arrhes seront notamment mentionnées - dans la mesure où elles sont compatibles avec le droit turc. Dans le deuxième et troisième chapitres, les concepts du dédit réel et de la peine résolutoire, qui ont des fonctions similaires, seront examinés du point de vue de leur nature, de leurs fonctions, de leur sort en cas d'exécution ou d'inexécution de l'obligation de prestation principale, et de l'application ou non du dernier alinéa de l'art. 182 COT concernant la réduction de la clause pénale. Dans ce contexte, seule le droit suisse sera analysé pour l'examen de ces concepts, compte tenu de la nature exceptionnelle desdites dispositions.

Mots clés

Les Arrhes, Le Dédit Réel, La Peine Résolutoire,La Réduction, La Peine Conventionnelle

Abstract

Acts that parties fulfill or undertake to fulfill in order to prove a contract concluded or to be rid of an undertaken commitment are frequently encountered in both daily and commercial life. When taking this situation into consideration, legislators have considered the importance of these types of centuries-old habits by introducing regulations to the Turkish Code of Obligations (TCO) on earnest money, forfeit money, or withdrawal and termination by paying a penalty and attaching certain legal consequences. This study aims to analyze each of these concepts separately in terms of theory and practice. The first section will analyze earnest money from the point of view of its nature, function, and fate in the event of performance or non-performance of the main performance obligation, as well as the application or non-application of the last paragraph of Article 182 in the TCO concerning the reduction of the contractual penalty. In particular, the first section will discuss the provisions of the German Civil Code concerning deposits and their compatibility with Turkish law. The second and third chapters will examine the concepts and similar functions of forfeit money and withdrawal or termination by paying a penalty from the point of view of their nature, their functions, and their fate in the event of performance or non-performance of the main performance obligation, as well as the application or non-application of the last paragraph of Article 182 in the TCO concerning the reduction of the contractual penalty. In this context, these sections will only analyze Swiss law regarding the examination of these concepts, given the exceptional nature of these provisions.

Keywords

Earnest Money, Forfeit Money, Contractual Penalty, Reduction, Withdrawal or Termination by Paying a Penalty

* **Corresponding Author:** Efe Can Yıldırır (Res. Asst. Dr.), Istanbul University, Faculty of Law, Department of Civil Law, Istanbul, Turkiye.
E-mail: efecan@istanbul.edu.tr ORCID: 0000-0002-8287-542X

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Extended Summary

Acts that parties fulfill or undertake to fulfill in order to prove a contract concluded or to be rid of an undertaken commitment are frequently encountered in both daily and commercial life. When taking this situation into consideration, legislators have considered the importance of these types of centuries-old habits by introducing regulations to the Turkish Code of Obligations (TCO) on earnest money, forfeit money, or withdrawal and termination by paying a penalty and attaching certain legal consequences. This study aims to analyze each of these concepts separately in terms of theory and practice.

According to Art. 177 para. 1 of the TCO, a sum of money paid by one of the parties at the time of the conclusion of the contract is considered proof of the conclusion of the contract (arrha confirmatoria). Earnest money, by virtue of it facilitating a function in terms of proof of conclusion of the contract and accentuation of the binding nature of this legal act, strengthens the creditor's position, similar to the contractual penalty. The payment of earnest money does not constitute an agreement distinct from the contract to which it relates. If the contract for the conclusion of which the sum of money paid as evidence is invalid, the agreement between the parties concerning this performance will also be invalid. According to Art. 177 para. 2 of the TCO, earnest money whose evidentiary quality for the conclusion of a contract is as a general rule presumed by the legislator to be set off against the principal claim (i.e., the principal obligation of the paying party). Although the presumption of the second paragraph is that it is to be deducted from the principal performance, the retention of earnest money by the beneficiary without deduction may be provided for in accordance with an agreement between the parties. If the principal obligation of the payer becomes impossible due to a circumstance for which they are responsible, the earnest money that is given in principle as proof of the conclusion of the contract is to be deducted from the amount of damages that the debtor (payer) is obliged to pay in accordance with the new legal presumption under the terms of the Art. 177 para. 2 of the TCO. If the contracting party terminates the contract for which the earnest money was paid at the time of its conclusion due to a breach of contract by the payer, the fate of the earnest money will be determined by whether it is a resolution or a termination.

Forfeit money can be defined as a sum of money that provides the payer with the power to withdraw from the contract without requiring a valid reason (licentia paenitendi). According to Art. 178 of the TCO, forfeit money is paid at the time a contract is concluded, giving the contracting parties the power to withdraw from the contract. The agreement concerning the forfeit money must be concluded in accordance with the form of the contract to which it relates. When the forfeit money is delivered, the parties obtain facultas alternativa concerning the performance of their contractual obligations or the resolution/termination of the contract. According

to the first sentence in Art. 178 of the TCO, both parties are deemed to have the right to terminate the contractual relationship in the event of payment of the forfeit money. The rest of the article states the fate of the forfeit to be governed by the party terminating the contract. Thus, if the payer withdraws from the contract, the real forfeit money amount will remain with the beneficiary; if the beneficiary withdraws from the contract, they will be obliged to return double the forfeit money to the payer. If the right to withdraw from the contract is not exercised, the actual forfeiture should be set off against the principal claim in analogy with the Art. 177 para. 2 of the TCO, unless the parties agree otherwise. The question of whether the last paragraph of Art. 182 of the TCO concerning the reduction of the contractual penalty is applicable to the actual forfeit money is controversial. In a contract where the resolutory penalty has been stipulated, the creditor can only demand performance of the principal obligation. The creditor's claim for performance can be paralyzed by the debtor's payment of the penalty. If the parties have agreed on a penalty, the debtor is the one who must prove that it is also a resolutory penalty. In other words, the contractual penalty is presumed, not the resolutory penalty. Given the nature of the resolutory penalty, which differs fundamentally from the contractual penalty in that it only provides the debtor with the power to withdraw from the contract instead of remaining bound by it, it cannot be deduced under the terms of the last paragraph of Art. 182 in the TCO on the grounds that the sum is excessive even by analogy, unless the contracting parties attribute a contractual penalty to the resolutory penalty.

L'introduction

Dans la vie quotidienne comme dans la vie commerciale, il arrive fréquemment que les parties exécutent ou s'engagent à exécuter certaines prestations afin de prouver le contrat qu'elles ont établi et parfois de se débarrasser des engagements qu'elles ont pris. Compte tenu de cette situation, le législateur, prenant en considération l'importance de ces habitudes séculaires, a réglementé dans le Code des obligations turc les dispositions relatives aux arrhes, au dédit réel et à la peine résolutoire et y a attaché certaines conséquences juridiques. Cette étude vise à analyser chacun de ces concepts séparément en termes de théorie et de pratique.

I. Les arrhes au sens de l'art 177 du Code des Obligations Turc (*Arrha Confirmatoria*)

A. La disposition légale et la fonction des arrhes

L'art. 177 du Code des obligations turc intitulé "*Les arrhes*" est rédigé comme suit:

"*Une somme d'argent donnée par une personne lors de la conclusion du contrat est réputé les donner en signe de la conclusion du contrat, et non à titre de dédit.*

Sauf usage local ou convention contraire, les arrhes sont imputées sur la créance principale"

Selon le premier alinéa de cette disposition, une somme d'argent versée par l'une des parties lors de la conclusion du contrat est considérée comme une preuve de la conclusion du contrat (*arrha confirmatoria*)[1]. Le même alinéa précise qu'il est présumé que le versement n'est pas réputé être dédit accordant à la partie payant le droit de se départir du contrat, conformément à *in favorem contractus*[2].

1 Les arrhes qui sont versées à titre de garantie fournie lors de la conclusion du précontrat, en d'autres termes *arrha imperfecto data,* n'est pas réglementée par la loi. Ce type des arrhes, qui peut être convenu dans le contrat conformement à l'autonomie de volonté, peut être remis pour l'effet contraignant de l'offre et donc pour la création d'un droit d'option au sens large en appartenant de toute façon au débiteur de l'option ou il peut s'agir seulement d'une exécution partielle ou d'une clause pénale convenue pour le cas où la partie du contrat s'abstient de conclure le contrat principal en violation de son obligation. Voir Volker Rieble, *J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse §§ 328-345 (Vertrag zugunsten Dritter, Draufgabe, Vertragsstrafe)* (Nouvelle édition 2020, Sellier / de Gruyter 2020), BGB §336 N 11. Lorsque le contrat principal est conclu, ces arrhes doivent être restituées ou imputées sur la créance principale découlant de celui-ci. Voir Eugen Bucher, *Allgemeiner Teil des Obligationenrechts* (2ème édition, Schultess 1988) 519; Peter Gauch et Walter R. Schluep et Susan Emmenegger, *OR AT Schweizerisches Obligationenrecht Allgemeiner Teil Band II* (11ème édition, Schultess 2020) N. 3863. Il convient de noter que la disposition concernant *arrha confirmatoria* (COT art. 177) est appliquée par analogie à ce type. Voir Hermann Becker, *Schweizerisches Zivilgesetzbuch, Obligationenrecht, Allgemeinen Bestimmungen, Art. 1-183 OR* (2ème édition, Stämpfli Verlag AG 1945) Art 158 N 2; Mehmet Erdem *La clause pénale, Étude comparative de droit suisse et de droit turc* (Ankara 2006) 26; Burcu Yağcıoğlu 'Bağlanma Parası, Cayma Parası, Bunların Ceza Koşuluyla Benzerlikleri ve Farklılıkları' (2017) 19 (Prof. Dr. Şeref Ertaş'a Armağan) DEÜHFD 1207, 1213.

2 Michel Mooser *Commentaire Romand, Code des obligations I,* Éditeurs: Luc Thévenoz et Franz Werro (3e édition, Helbing Lichtenhahn Verlag 2021) Art. 158 N 3. Une disposition similaire est également rédigée dans le deuxième alinéa du paragraphe 336 du Code civil allemand comme suit: "*Les arrhes ne peuvent être considérées comme dédit en cas de doute*." Cette présomption est l'expression de la nature contraignante du contrat. Voir Nisim Franko, "Pey Akçesinin

Les arrhes au sens de l'art. 177 du COT, en vertu de leur fonction facilitatrice en termes de preuve de la conclusion du contrat et d'accentuation du caractère contraignant de cet acte juridique[3], renforcent la position du créancier similaire à la clause pénale[4].

B. Le domaine d'application

Dans le droit moderne, les domaines les plus courants où l'on rencontre les arrhes au sens de l'art. 177 du COT dont l'application a considérablement diminué au fil du temps avec la mise à disposition de méthodes plus fiables par l'ordre juridique sont les ventes de produits agricoles, le commerce d'animaux ou les relations de travail domestique[5]. Dans le langage courant turc le terme "*kapora*" est utilisé pour exprimer ces arrhes[6].

Ces arrhes trouvent un domaine d'application surtout dans les contrats qui ne doivent pas être conclus par écrit ou lorsque les parties ne se sont pas mises d'accord sur les points secondaires malgré leur intention de conclure un contrat ou quand il s'agit d'une coutume de conclure un contrat sous une forme écrite, auquel cas la présomption selon laquelle les parties ne seront pas liées tant que le contrat n'est pas signé peut être réfutée par la remise d'une somme d'argent[7]. Dans ce contexte, la nature de l'argent donné par les parties qui se sont entendues verbalement sur les éléments essentiels d'un contrat ultérieurement soumis à une forme particulière (de

Mahiyeti", (1996) LV (1-2) İÜHFM 249, 258. En revanche, *Serozan* est d'avis que cette disposition est une réflexion malencontreuse du principe de "*pacta sunt servanda*". Pour cela, voir Rona Serozan, *Sözleşmeden Dönme* (2ème édition, Vedat 2007) 215.

3 Pour la nature déclaratoire voir Hugo Oser et Wilhelm Schönenberger, *Kommentar zum Schweizerischen Zivilgesetzbuch, Das Obligationenrecht, Erster Halbband: Art. 1-183* (2ème édition, Schultess & Co 1929) Art 158 N 1; Serpil Altop, *Roma Malvarlığı Hukukunda Pey Akçesi "Arra"* (Istanbul 1994) 122.

4 Katja Roth Pellanda, *Handkommentar zum Schweizer Privatrecht, Obligationenrecht-Allgemeine Bestimmungen Art. 1-183 OR,* Éditeurs: Andreas Furrer et Anton K. Schnyder (Schultess Juristische Medien AG 2016) Art. 158 N 3; dans le même sens voir Daniel Wuffli, *Orell Füssli Kommentar, OR Kommentar, Schweizerisches Obligationenrecht* (3e édition, Orell Füssli 2016) Art 158 N 2; Wolfgang Walchner, *Nomos Kommentar, BGB Schuldrecht, Band 2: §§241-853,* Éditeurs: Barbara Dauner-Lieb et Werner Langen (4e édition, Nomos 2021) BGB § 336 Rn 1. Même si elles ont une fonction similaire, les arrhes au sens de l'art. 177 du COT diffèrent de la clause pénale en ce qu'elles sont remises lors de la conclusion du contrat et non lors de la survenance de l'obstacle à l'exécution. Voir Claire Huguenin, *Obligationenrecht, Allgemeiner und Besonderer Teil* (3e édition, Schultess 2019) N 1246. Sur la fonction de garantie des arrhes voir Yağcıoğlu (n 1) 1215-1216.

5 Andreas von Tuhr et Arnold Escher, *Allgemeiner Teil des Schweizerischen Obligationenrechts Band II (mit Supplement)* (3e édition, Schultess Polygraphischer Verlag, 1984); Oser et Schönenberger (n 3) Art 158 N 1; dans le même sens voir Yağcıoğlu (n 1) 1213.

6 Feyzi Necmeddin Feyzioğlu, *Borçlar Hukuku Genel Hükümler, Cilt II* (2ème édition, Fakülteler Matbaası 1977) 374; Ferit H. Saymen et Halid K. Elbir, *Türk Borçlar Hukuku I, Umumî Hükümler, İkinci Cilt* (İsmail Akgün Matbaası 1958) 827; Mehmet Erdem, 'Pey Akçesi-Pişmanlık Akçesi-Dönme Tazminatı', *Prof. Dr. Hüseyin Hatemi'ye Armağan, Cilt: I* (Vedat Kitapçılık 2009) 665; Yağcıoğlu (n 1) 1215. Certains auteurs utilisent l'expression de "*kapora*" pour exprimer non seulement les arrhes mais aussi le dédit réel et l'exécution partielle. Voir Selahattin Sulhi Tekinay et Galip Sermet Akman et Haluk Burcuoğlu et Atilla Altop, *Tekinay Borçlar Hukuku Genel Hükümler* (7e édition, Filiz Kitabevi 1993) 338. Bien que l'expression de "*kapora*" soit couramment utilisée pour exprimer les arrhes *Franko* prétend qu'il s'agit d'une traduction erronée de "*cappara penitentialis"* dans le code civil italien. Voir Franko (n 2) 252. *Oğuzman* et *Öz* utilisent ce terme pour le dédit réel. Voir M. Kemal Oğuzman et M. Turgut Öz, *Borçlar Hukuku Genel Hükümler, Cilt II* (17e édition, Vedat 2022) N 1639.

7 Bucher (n 1) 516 note 3.

façon volontaire) est controversée dans la doctrine. Alors qu'un avis affirme que l'argent donné est considéré comme *arrha imperfecto data* pour un certain contrat à établir dans le futur[8], l'autre soutient que l'argent remis est sous forme des arrhes qui servent à réfuter la présomption de l'art 17 du COT selon laquelle les parties qui ont convenu de donner une forme spéciale sont réputées n'avoir entendu se lier que dès l'accomplissement de cette forme[9]. Étant donné que la somme d'argent versée dans la possibilité susmentionnée n'est pas basée sur un précontrat[10] et est remise comme preuve de la nature contraignante des négociations du contrat principal, nous pensons qu'il est plus correct d'accepter qu'il ne s'agisse pas *d'arrha imperfecto data* mais des arrhes données pour lier les parties au contrat qu'elles souhaitent conclure, contrairement à la présomption règlementée par le premier alinéa de l'art. 17 COT.

C. La nature et le contenu des arrhes

Dans le premier alinéa de l'art. 177 du COT, une présomption[11] a été prévue par le législateur en ce qui concerne la nature d'une somme d'argent versée lors de la conclusion du contrat[12]. En vertu de cette présomption, cette exécution qui ne constitue pas une indication du contenu du contrat prouve seulement la conclusion de celui-ci[13]. Dans ce contexte, il faut souligner que la conclusion du contrat peut

8 von Tuhr et Escher (n 5) 289; Oser et Schönenberger (n 3) Art 158 N 2.

9 Bucher (n 1) 520; Markus Widmer et Renato Constantini et Felix R. Ehrat, *Basler Kommentar Obligationenrecht I Art. 1-529 OR*, Éditeurs: Corinne Widmer Lüchinger et David Oser (7e édition, Helbing Lichtenhahn Verlag 2020) Art 158 N 9; Pellanda (n 4) Art 158 N 16.

10 En fait, la convention sur la forme réservée ne constitue pas un précontrat. Voir Arif Barış Özbilen, *Sözleşmelerin Şekli ve Şekil Yönünden Hükümsüzlüğü* (On İki Levha 2016) 123.

11 Le second alinéa de l'art. 190 du code de procédure civil est rédigé sur les présomptions légales comme suit: "*La partie qui se prévaut d'une présomption légale n'a la charge de la preuve qu'en ce qui concerne les faits qui constituent le fondement de la présomption. Sauf exceptions prévues par la loi, l'autre partie peut prouver le contraire de la présomption légale*." Pour un exemple de présomption voir Serpil Işık, " Medenî Usûl Hukuku Açısından 6098 Sayılı Türk Borçlar Kanunu'nun 60'ıncı Maddesinin Değerlendirilmesi" (2023) 9 (2) AndHD 391 note 52. Les présomptions de fait par ailleurs réfutables sont des règles particulières en matière de charge de la preuve. Voir Vildan Peksöz, *Hukuk Muhakemesi Kapsamında Karineler ve Faturanın Hukuki Niteliği* (Thèse de maîtrise non publiée 2014) 80.

12 Saymen et Elbir (n 6) 828; Gauch et Schluep et Emmenegger (n 1) N 3859; Mooser (n 2) N 2; Widmer et Constantini et Ehrat (n 9) N 4; Erdem (n 6) 667; Oğuzman et Öz (n 6) N 1641; Fikret Eren et Ünsal Dönmez, *Eren Borçlar Hukuku Şerhi, Cilt: III (m. 83-206)* (Yetkin 2022) M 177 N 1; İlhan Helvacı, *Le droit turc du contrat* (Schultess 2018) 254. En droit allemand dans le même sens sur BGB § 336 voir Peter Gottwald, *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 3, Schuldrecht Allgemeiner Teil II,* Éditeur: Wolfgang Krüger (8. Auflage, CH Beck 2019) BGB § 336 Rn 8; Walter Lindacher, *Soergel Kommentar, Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzten, Band 5/3, Schuldrecht 3/3, §§ 328-432* (13e édition, Verlag W. Kohlhammer 2010) § 336 Rn 1; Christian Janoschek, *Beck'sche Online-Kommentar*, Éditeurs: Wolfgang Hau et Roman Poseck (66e édition CH Beck 2023) BGB § 336, Rn 1; Wolfgang Walchner (n 4) BGB § 336 Rn 4; Astrid Stadler, *Jauernig Bürgerliches Gesetzbuch Kommentar*, Éditeur : Rolf Stürner (18e édition, CH Beck 2021) §§ 336-338 Rn 1; Martin Fries et Reiner Schulze, *Nomos Kommentar, Bürgerliches Gesetzbuch Handkommentar* (11e édition, Nomos 2022) § 336 Rn 1. En soulignant que BGB § 336 est une règle de preuve et non une règle d'interprétation Rieble (n 1) § 336, Rn 1. *Serozan* soutient que cette disposition malencontreuse et seulement supplétive devrait être subordonnée au principe de la confiance découlant de l'art 2 du TCC et que le juge devrait avoir la possibilité de déterminer librement la nature de l'argent versé lors de la conclusion du contrat en interprétant les déclarations de volonté des parties contractantes à la lumière des intérêts concrets et, le cas échéant, en les assumant. Voir Serozan (n 2) 215-216 et note 34.

13 Wolfgang Walchner (n 4) BGB § 336 Rn 4. Même si la notion des arrhes est traitée par le législateur concernant les obligations contractuelles, il est admis aussi qu'il est possible de verser des arrhes pour celles découlant d'autres actes juridiques. Voir Pellanda (n 4) Art 158 N 2. La fonction probatoire des arrhes est limitée en cas de litige. Si le contrat dont l'existence est alléguée n'a pas été pas fait par écrit aux termes de l'art. 200 du code procédure civil turc il est impossible de la prouver en établissant le versement des arrhes dont la somme est inférieure du plafond citée dans ledit article par

être aussi prouvée -par d'autres moyens- sans établir le versement des arrhes et que la caractéristique de preuve de celles-ci peut également être réfutée[14] en démontrant que la somme d'argent a été versée pendant la période où le contrat n'était pas encore conclu[15]. En outre, l'une des parties (en général la partie donnant) peut prouver que la somme d'argent a été versée afin de résilier librement le contrat de sorte que cette exécution soit considérée du dédit réel.

Dans la plupart des cas, comme l'a adopté le législateur dans son choix d'expression lors de la rédaction dudit article, la remise des arrhes est réalisée sous forme du paiement d'une certaine somme d'argent. Par conséquent, en règle générale, les arrhes sont transférées dans le patrimoine de du contractant[16]. En outre le transfert de toutes sortes de biens ou de droits, et même le transfert de possession d'une chose[17] (comme dans le cas où les arrhes ne peuvent pas être imputées sur la créance principale[18]) peut théoriquement constituer une preuve de la conclusion du contrat[19].

Comme les arrhes sont versées au moment de la conclusion du contrat, c'est-à-dire qu'elles ne sont pas promises, il n'est pas possible d'intenter une action en exécution des arrhes[20].

Le versement des arrhes ne forme pas une convention distincte du contrat auquel elle se rapporte[21]. Les arrhes ne sont pas un élément essentiel ni une forme de validité

témoignage. Voir Rıza Düzceer, 'Pey Akçesi ve Zımanı Rücu', (1956) 3 (3) Adalet Dergisi 342, 344-345.

14 Dieter Medicus et Stephan Lorenz, *Juristische Kurz-Lehrbücher, Schuldrecht I* (22e édition, C.H. Beck 2021) § 43 Rn. 2.

15 Dans le même sens Gottwald (n 12) BGB § 336 Rn 8.

16 Janoschek (n 12) BGB § 336 Rn 1; dans le même sens Mooser (n 2) Art. 158 N 1.

17 Rieble (n 1) § 336 Rn 4; Gottwald (n 12) BGB § 336 Rn 7; Janoschek (n 12) § 336, Rn 1. Cf. Wolfgang Walchner (n 4) BGB § 336 Rn 3. En outre cet auteur indique que le bénéficiaire obtient également la possession et la propriété dans le cas où les arrhes ne peuvent pas être imputées sur la créance principale. À notre avis, sous la lumière de la liberté contractuelle, il n'y a pas d'obstacle à ce que les parties se mettent d'accord sur la mise d'un objet à disposition pour l'usage d'une chose -sous forme du transfert de possession- en tant qu'arrhes au sens de l'art. 177 du COT.

18 Pour plus d'explications sur cette possibilité voir p 216-217.

19 Rieble (n 1) § 336 Rn 4. La majorité de la doctrine se contente d'indiquer qu'une autre chose que de l'argent peut être remise comme des arrhes. Voir Altop (n 3) 122; Franko (n 2) 256; Pierre Engel, *Traité des obligations en droit suisse, Dispositions générales du CO* (2e édition Stämpfli 1997) 860, Erdem (n 1) 27; Marc Wolfer, *Reurecht und Reugeld auf vertraglicher Grundlage* (Dike Verlag 2012) N. 61 note 136; Widmer et Constantini et Ehrat (n 9) Art 158 N 6; Pellanda (n 4) Art 158 N 4; Mustafa Alper Gümüş, *Borçlar Hukukunun Genel Hükümleri* (Yetkin 2021) 1037. En revanche, puisque le législateur mentionne explicitement le terme "argent" dans le premier alinéa de l'art. 177 du COT, *Yağcıoğlu* prétend que les arrhes peuvent consister seulement en argent. Voir Yağcıoğlu (n 1) 1212. À notre avis, bien que l'art. 177 du COT mette l'accent -contrairement au règlement équivalent du code civil allemand- sur la caractéristique monétaire des arrhes nous ne sommes pas d'accord avec cette interprétation étroite en tenant compte à la fois du fait que les arrhes consistent en une preuve pour la conclusion du contrat et de la nature supplétive dudit article. Tandis que cela n'est pas habituel, nous sommes d'avis que la preuve de la conclusion du contrat est également possible avec un autre chose qu'une somme d'argent.

20 Becker (n 1) Art 158 N 4; Erdem (n 1) 28; dans le même sens Franko (n 2) 253. Il ne faut pas en conclure que l'exécution de la somme de l'argent promise lors de la conclusion du contrat ne peut pas être poursuivie. Dans le cas susmentionné, bien qu'il soit possible d'intenter une action en exécution de l'argent contre le promettant, ce qui est exigé n'est pas conceptuellement les arrhes au sens de l'art. 177 du COT. Dans le même sens Gauch et Schluep et Emmenegger (n 1) N 3862; Widmer et Constantini et Ehrat (n 9) Art 158 N 7. En fait, la notion d'arrhes consensuelles est contradictoire. Voir Roger Secretan, *Étude sur la clause pénale en droit suisse* (Imprimerie La Concorde 1917) 19.

21 Cette situation est exprimée de différentes manières dans la doctrine. Certains auteurs qualifient le versement des arrhes de contrat accessoire [Voir Janoschek (n 12) BGB § 336 Rn 1] tandis que d'autres le considère comme une partie du contrat dont la conclusion est prouvée [Wolfgang Walchner (n 4) BGB § 336 Rn 4]. Un autre avis analysant plus en détail

pour la conclusion d'un contrat[22]. Les arrhes ne constituent que la preuve de la formation d'un contrat valablement conclu. Dans ce contexte, un contrat qui n'a pas été fait conformément aux conditions de validité ne peut être considéré comme valable en raison du fait qu'une certaine somme d'argent a été versée lors de la conclusion[23]. Si le contrat pour la conclusion duquel la somme d'argent versée à titre probatoire est non valable, l'accord entre les parties concernant cette exécution ne sera pas valable[24], et dans ce contexte, la somme versée comme preuve de la conclusion de cet acte juridique sera restituée[25], par principe, dans le cadre des dispositions relatives à l'enrichissement illégitime[26].

En règle générale, les arrhes peuvent être remises à l'autre partie du contrat. En outre il est aussi possible de les verser au tiers[27].

D. Le sort des arrhes en cas d'exécution de la créance principale

Le sort des arrhes est régi par le second alinéa de l'art. 177 du COT comme suit :

"Sauf usage local ou convention contraire, les arrhes sont imputées sur la créance principale"

soutient que les arrhes sont une exécution unilatérale de la partie versant fondée sur l'accord réel des parties contractantes de conclure un contrat principal valide et que les arrhes ne reposent donc pas sur un accord distinct [Rieble (n 1) § 336 Rn 5; dans ce contexte cet auteur considère le versement des arrhes comme prestation sans cause juridique" voir Rieble (n 1) § 337 Rn 1]. *Feyzioğlu* et *Tekinay et al.* se contentent d'indiquer que les arrhes sont accessoires de la dette principale Feyzioğlu (n 6) 376; Tekinay et Akman et Burcuoğlu et Altop (n 6) 339. Cependant *Yağcıoğlu* prétend que les arrhes sont "un accessoire indépendant du contrat conclu ". Pour cela, voir Yağcıoğlu (n 1) 1220. À notre avis, cette qualification est contradictoire si l'on tient compte du fait que l'adjectif "indépendant" signifie "non accessoire".

22 Rieble (n 1) § 336 Rn 2 ; dans le même sens Medicus et Lorenz (n 14) § 43 2.

23 Secretan (n 20) 21; Gottwald (n 12) BGB § 336 Rn 9; Janoschek (n 12) BGB § 336 Rn 1; Wolfgang Walchner (n 4) BGB § 336 Rn 4. Dans le contexte de la violation des exigences de la forme dans le même sens Martin Fries et Reiner Schulze (n 12) § 336 Rn 1.

24 Altop (n 3) 123; Düzceer (n 12) 343.

25 Selon un autre arrêt de la Cour de cassation, lorsque le contrat pour la future conclusion de laquelle les arrhes sont versées n'est pas conclu sans faute des parties les arrhes doivent être restituées. Voir 19e Chambre civile de la Cour de cassation turque datée du 01.12.2016 dossier no: 2016/4403 décision no: 2016/15392. Dans un autre arrêt portant sur le second alinéa de l'art. 156 du CO no : 818, la Cour de cassation admet la restitution des arrhes même si la conclusion est empêchée par la faute du verseur. Voir 19e Chambre civile de la Cour de cassation turque datée du 20.01.2016 dossier no: 2015/9931 décision no: 2016/442 (Kazancı).

26 Gottwald (n 12) Rn. 9; Wolfgang Walchner (n 4) BGB § 336 Rn 4; Rieble (n 1) BGB § 337 Rn 9; Janoschek (n 12) BGB § 336 Rn 1; von Tuhr et Escher (n 5) 287; Bucher (n 1) 517; Düzceer (n 12) 349; Franko (n 2) 253 ; Widmer et Constantini et Ehrat (n 9) Art 158 N 8; Wuffli (n 4) Art 158 N 6 ; Feyzioğlu (n 6) 376 ; Erdem (n 1) 27; Hüseyin Hatemi et Emre Gökyayla, *Borçlar Hukuku, Genel Bölüm* (5e édition Filiz 2021) 410; Yağcıoğlu (n 1) 1220-1221; Eren et Dönmez (n 12) M 177 N 5 ; Mooser (n 2) Art 158 N 5a; voir l'assemblée plénière des chambres civiles de la Cour de cassation datée du 17.06.2020 dossier no: 2017 /13-592 décision no: 2020/430; 3e Chambre civile de la Cour de cassation turque datée du 15.11.2018 dossier no 2017/1137 décision no 2018/11653 (Kazancı). Certains auteurs prétendent que la restitution des arrhes peut être exigée en outre par voie d'action en revendication. Voir Tekinay et Akman et Burcuoğlu et Altop (n 6) 340; Altop (n 3) 125. Comp *Oğuzman* et *Öz* indiquant que la base juridique de l'obligation de restitution est l'enrichissement illégitime ou l'exécution d'une obligation de restitution. Voir Oğuzman ve Öz (n 6) N 1645; Seda Öktem Çevik, 'Ceza Koşulu-Bağlanma Parası-Cayma Parası' *Prof. Dr. İsmet Sungurbey'e Armağan, Cilt: III*, Éditeurs: Herdem Belen et İsmail Altay (İstanbul Barosu Yayınları 2014) 97, 112. Dans le cas où le versement des arrhes consiste en transfert de possession d'une chose dans le cas susmentionné la possession peut être restitué par voie d'action en revendication et/ou *condictio possessionis*. Pour plus d'explications sur la comparaison de la restitution fondée sur l'enrichissement illégitime avec la restitution par voie d'action en revendication et celle dans le cadre de *condictio possessionis* voir Turgut Öz, *Öğreti ve Uygulamada Sebepsiz Zenginleşme* (Kazancı 1990) 62-63, 66-67.

27 Pellanda (n 4) Art 158 N 4.

Selon cette disposition, en règle générale, les arrhes dont la qualité probatoire pour la conclusion du contrat est présumée par le législateur sont imputées sur la créance principale (l'obligation principale de la partie versant). Toutefois, si la disposition contractuelle convenue par les parties ou l'usage locale prévoit que le bénéficiaire les garde, les arrhes ne seront pas imputées.

Par son contenu, le second alinéa de l'art. 177 du COT diffère substantiellement du second alinéa de l'art. 158 du code des obligations suisse dont le code des obligations turc est fortement influencé. En effet ce dernier accentuant la qualité purement probatoire des arrhes est rédigé comme suit :

"*Sauf usage local ou convention contraire, celui qui a reçu les arrhes les garde sans avoir à les imputer sur sa créance.*"[28]

Cependant, la disposition turque est concordante au premier alinéa du paragraphe 337 du code civil allemand[29]. En effet, le premier alinéa du paragraphe 337 du code civil allemand est rédigé comme suit :

"*En cas de doute, les arrhes sont imputées sur la prestation due par le verseur ou, si cela n'est pas possible, être restituées lors de l'exécution du contrat.*"

La règle énoncée au second alinéa de l'art. 177 du COT selon laquelle les arrhes doivent être déduites[30] sur la créance principale révèle que le fait que les arrhes, en règle générale, ne sont pas supplémentaires[31] par rapport à l'obligation principale due[32]. Bien que cette règle interprétative vise à révéler l'intention réelle des parties

28 Cette présomption prévue la disposition suisse qui n'est pas réaliste (sauf peut-être dans des cas de coutumes ancestrales) ne correspond pas aux conceptions actuelles des affaires. Pour cette critique voir Bucher (n 1) 516; dans le même sens Huguenin (n 4) 1244. Par conséquent, cette présomption doit être interprétée de manière restrictive voir Widmer et Constantini et Ehrat (n 9) Art. 158 N 7. Selon *Engel* précisant que si le montant des arrhes excèdent manifestement le but quasi symbolique de cette exécution cette présomption peut être facilement renversée. Voir Engel (n 19) 860-861; dans le même sens Becker (n 1) Art 158 N 3; Erdem (n 1) 28; Gaspard Couchepin, *La clause pénale- Etude générale de l'institution et de quelques applications pratiques en droit de la construction* (Schultess Juristische Medien 2008) N 1097. Dans ce contexte, en droit suisse, le versement des arrhes signifie une extension de l'obligation du débiteur. Voir von Tuhr et Escher (n 5) 287; Gauch et Schluep et Emmenegger (n 1) N 3859; Mooser (n 2) Art 158 N 4; dans le même sens Pellanda (n 4) Art 158 N 14.

29 Le deuxième alinéa de l'art. 156 du code des obligations turc no: 818 du 22.04.1926 est rédigé de manière à correspondre exactement au celui de l'art. 158 du COS comme suit: "*Sauf usage local ou convention contraire, celui qui a reçu les arrhes les garde sans avoir à les imputer sur sa créance.*" Toutefois pendant la période où la loi susmentionnée était en vigueur il était admis que de nombreux usages locaux étaient en faveur de l'imputation des arrhes sur la créance principale. Voir Saymen et Elbir (n 6) 829; Feyzioğlu (n 6) 376; Erdem (n 1) 28; Tekinay et Akman et Burcuoğlu et Altop (n 6) 340; Altop (n 3) 123.

30 Pour une interpération *contra legem* de cette nouvelle disposition voir Eren et Dönmez (n 12) M 177 N 4.

31 En droit allemand voir Rieble (n 1) § 337 Rn 1; Gottwald (n 12) § 337 Rn 2; Martin Fries et Reiner Schulze (n 12) § 337 Rn 1.

32 Dans la pratique, on constate que les promotions sont accordées spécialement pour engager le bénéficiaire à conclure un contrat. Lorsqu'un contrat est conclu, le promoteur promet une nouvelle prestation différente de celle fournie avant cet acte juridique. Les arrhes au sens de l'art. 177 du COT diffèrent de la promotion, car leur but n'est pas d'assurer la conclusion du contrat, mais de la prouver. Voir Wolfgang Walchner (n 4) § 336 Rn 7. Dans ce contexte les programmes de fidelités (Miles & Miles, Pegasus BOLBOL) ne sont pas des arrhes non plus. Voir Rieble (n 11) § 336 Rn 8. De même, l'argent remis à une personne pour résilier un contrat et conclure un nouveau avec une autre personne - compte tenu de la différente fonction du paiement (rémunérant la volonté de la conclusion du contrat) et du montant élevé- ou les frais de la conclusion du contrat ne sont pas des arrhes. Voir Rieble (n 1) § 336 Rn 9-10.

en fonction de la nature des affaires, l'existence de cette présomption en cas de doute n'empêchera pas le juge de s'efforcer de rechercher si leurs intentions sont orientées dans une autre direction par le biais d'interprétation[33].

Comme cette acquisition ne constitue pas non plus l'exécution d'une obligation, elle ne peut pas être considérée comme celle d'une partie de l'obligation (exécution partielle)[34]. Cependant, si les arrhes qui sont prévues pour être imputées sur la créance principale en vertu du second alinéa de l'art. 177 du COT[35] sont déductibles[36] ils deviennent presqu'une exécution partielle, bien que leur nature soit différente[37].

Afin que l'imputation visée au second alinéa de l'art. 177 du COT puisse être réalisée les arrhes et la créance principale doivent être de même espèce (argent ou autre bien)[38]. Dans ce contexte, étant donné que dans la pratique, les arrhes sont presque toujours remises en argent, la créance principale doit porter également sur une somme d'argent pour l'application dudit article.

Dans le cas où les arrhes et la créance principale sont de même espèce, l'imputation aura lieu sans qu'aucune déclaration à ce sujet ne soit nécessaire. Le moment de la déduction dépend de la question de savoir si l'obligation du verseur peut être exécutée avant son échéance ou non. Si elle ne peut pas être exécutée avant l'échéance l'imputation sera suspendue jusqu'à celle-ci[39].

Bien que la présomption du second alinéa soit de les imputer de la prestation principale, la retenue des arrhes par le bénéficiaire sans imputation peut être prévue conformément à la convention des parties. Cet accord peut être fondé sur des déclarations expresses de volonté, ou il peut être conclu implicitement, comme dans le cas où les arrhes et la créance principale ne sont pas de même espèce (par exemple, la bague offerte pour la conclusion des fiançailles).

33 Par conséquent, l'interprétation et l'usage local ou commun, peuvent conduire à la conclusion que les arrhes sont une prestation supplémentaire. Voir Rieble (n 1) § 337 Rn 4.

34 Gottwald (n 12) BGB § 337 Rn 3. En fait, l'exécution partielle peut avoir lieu en tant que paiement anticipé de la prestation promise ou avant que le contrat ne devienne contraignant et l'expiration du droit à sa restitution en cas de survenance d'obstacle à l'exécution est exclue de par la loi. Voir Stadler (n 12) BGB §§ 336-338 Rn 2. Il convient toutefois de noter que si l'exécution partielle a lieu au moment de la conclusion du contrat, elle remplit également une fonction similaire à celle des arrhes, bien qu'elle soit de nature complètement différente. Voir Rieble (n 1) § 336 Rn 6.

35 Ce règlement peut être qualifié de disposition légale d'extinction. En ce qui concerne le premier alinéa du paragraphe 337 du code civil allemand dans le même sens voir Wolfgang Walchner (n 4) BGB § 337 Rn. 2. *Von Tuhr et Escher* prétendent que par l'imputation des arrhes sur la créance principale une exigibilité particulière est déterminée. Voir von Tuhr et Escher (n 5) 287.

36 En cas d'exécution partielle comme il s'agit de la prestation propre du débiteur qui est exécutée, l'imputation de celle-ci est réalisée conformément au premier alinéa de l'art. 100-102 de COT et non au premier alinéa de l'art. 177 du COT. Dans le même sens en droit allemand Rieble (n 1) BGB § 336 Rn 7.

37 Dans le même sens Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (26e édition Turhan 2022) 987; aux termes du second alinéa de l'art. 156 du CO no: 818 voir Feyzioğlu (n 6) 376. Néanmoins, en ce qui concerne la possibilité susmentionnée, *Yağcıoğlu* prétend que les arrhes constituent une exécution partielle. Voir Yağcıoglu (n 1) 1214.

38 Rieble (n 1) § 337 Rn 2.

39 Dans le même sens en droit allemand Rieble (n 1) § 337 Rn 3.

La retenue des arrhes chez le bénéficiaire peut également résulter de l'existence d'un usage local[40] même en l'absence d'une telle convention.

En cas de leur retenue, les arrhes ne sont pas imputées sur la créance principale et restituées conformément à l'article 103 du COT après l'exécution de l'obligation principale[41]. Dans les cas où les arrhes ne sont pas imputées, la question de savoir les dispositions selon lesquelles la restitution au verseur aura lieu est controversée. Une opinion soutient que cette restitution doit avoir lieu conformément aux dispositions relatives à l'enrichissement illégitime[42] et une autre prétend qu'elle doit avoir lieu conformément aux dispositions relatives à la liquidation du contrat[43]. Le fait qu'elles soient -par principe- restituées[44] distingue les arrhes de la prestation supplémentaire que le bénéficiaire peut retenir même après l'exécution de la dette[45]. À notre avis, au cas où il n'est pas possible d'imputer les arrhes sur la créance principale elles doivent être restituées conformément aux dispositions relatives à la liquidation du contrat. En fait, si la nature des arrhes se prêtait à l'imputation ou si les parties n'en avaient pas convenu autrement la remise des arrhes servant à prouver la conclusion du contrat a une fonction similaire à l'exécution partielle donc elle ne peut constituer un enrichissement illégitime en cas de l'extinction de la principale par exécution[46].

L'art. 177 du COT ne contient aucune disposition sur la question de savoir quand l'obligation de restitution devient exigible lorsque les arrhes doivent être remboursées. À notre avis, elle devient exigible lors de l'exécution de la prestation principale du verseur découlant du contrat. En fait, avec cette exécution, la nature probatoire des arrhes disparaitra[47].

40 Dans ce contexte, il n'est pas nécessaire que les parties aient connaissance de l'existence d'un usage locale pour que naisse l'obligation de retenir. Comp Oser et Schönenberger (n 3) Art 158 N 3.

41 Dans le même sens aux termes du second alinéa de l'art. 156 du CO no: 818 ou de l'art. 158 COS Feyzioğlu (n 6) 378; Secretan (n 20) 30; Erdem (n 6) 669; comp Huguenin (n 4) N 1244; pour l'opinion minoritaire s'opposant à la restitution et que nous ne rejoignons pas voir Saymen et Elbir (n 6) 829. Le premier alinéa du paragraphe 337 du code civil allemand indique clairement que si l'imputation des arrhes n'est pas possible, elles doivent être restituées lors de l'exécution du contrat.

42 Rieble (n 1) BGB § 337 Rn 6.

43 Gottwald (n 12) § 337 Rn. 4; Janoschek (n 12) § 337 Rn 1; Stadler (n 12) §§ 336-338 Rn 3.

44 Il convient également de noter que les fiancées munies d'une bague de fiançailles ne se la rendent pas l'un à l'autre même si elles se marient. Voir Rieble (n 1) § 337 Rn.7.

45 Wolfgang Walchner (n 4) § 337 Rn 3; Medicus et Lorenz (n 14) § 43 Rn 2.

46 La restitution fondée sur l'enrichissement illégitime (en raison de prestation) est due, en particulier, de ce qui a été reçu sans cause valable, en vertu d'une cause qui ne s'est pas réalisée, ou d'une cause qui a cessé d'exister. Pour plus d'explications voir Öz (n 26) 81-122. Dans ce cas aucun de ces trois cas n'existe en l'espèce.

47 L'obligation du verseur et celle de restitution du bénéficiaire doivent être exécutées simultanément. Voir Rieble (n 1) § 337 Rn 6. En plus pour les explications détaillées sur l'exigibilité voir aussi Serpil Işık, "7101 Sayılı Kanunla Yapılan Değişiklikler Çerçevesinde Adi Konkordatoda Mühletin Müstakbel Alacakların Devri Üzerindeki Etkisi" (2022) 28 (1) MÜHFHAD 429-430.

E. Le sort des arrhes en cas d'inexécution et de la résiliation du contrat

Ni le code des obligations turc ni le code des obligations suisse ne contient de disposition sur le sort des arrhes en cas d'obstacle à l'exécution de l'obligation principale du verseur. Néanmoins dans le Code civil allemand, où les arrhes sont réglementées de manière plus détaillée ce sort est régi par le paragraphe 338[48].

Il est utile d'analyser les conséquences juridiques en fonction de deux possibilités.

1. Si les arrhes sont imputables sur la créance principale (conformément à la présomption légale)

Si l'exécution de l'obligation principale du verseur devient impossible en raison d'une circonstance qui lui est imputable, en cas d'exigence des dommages intérêts aux termes de l'art. 112 du COT les arrhes remises en preuve de la conclusion du contrat -conformément à la nouvelle présomption légale aux termes du second alinéa de l'art. 177 du COT- devront être imputées sur le montant des dommages-intérêts[49]. Cette conclusion juridique sera également valable si le bénéficiaire réclame ses dommages-intérêts en renonçant à l'exécution de l'obligation à la suite de la demeure fautive du débiteur (verseur) dans un contrat bilatéral[50].

Si le débiteur (verseur) faillit à son obligation telle qu'elle prévue dans le contrat (mauvaise exécution) en raison d'une circonstance qui lui est imputable, en cas d'exigence des dommages intérêts selon l'art. 112 du COT elles devront être imputées sur le montant des dommages-intérêts que le débiteur (verseur) est tenu de payer[51].

Si le contractant met fin au contrat pour lequel les arrhes ont été remises lors de sa conclusion en raison d'une violation du contrat par le verseur, pour le sort des arrhes il sera déterminant qu'il s'agit d'une résolution ou d'une résiliation. A moins qu'il n'y ait une convention entre les parties à cet égard[52], la résolution du contrat nécessite la

48 *"Si la prestation due par le verseur devient impossible en raison d'une circonstance qui lui est imputable ou si le verseur est responsable de la résiliation du contrat, le bénéficiaire est en droit de retenir les arrhes. Si le bénéficiaire réclame des dommages-intérêts pour inexécution, en cas de doute les arrhes doivent être imputées ou, si cela n'est pas possible, restituées lors de l'exécution des dommages-intérêts."*

49 En droit allemand dans le même sens Rieble (n 1) § 338 Rn 5; Gottwald (n 12) § 338 Rn 3. En droit suisse en se référant du second alinéa du paragraphe 338 allemand et le comparant avec la présomption de la disposition suisse dans le même sens Bucher (n 1) 517; Widmer et Constantini et Ehrat (n 9) Art 158 N 8; pour le cas où les arrhes sont imputables dans le même sens en indiquant l'application par analogie du second alinéa de l'art 161 COS (de celui de l'art 180 COT) Gauch et Schluep et Emmenegger (n 1) N 3861. En droit turc sans faire de distinction sur la possibilité d'imputation sur la créance principale) pour l'imputation des arrhes sur les dommages-intérêts voir Işıl Yelkenci, *Karşılaştırmalı Hukukta Ceza Koşulu* (Thèse de doctorat non publiée 2022) 250; voir aussi 11e Chambre civile de la Cour de cassation turque datée du 14.02.2014 dossier no: 2014/423 décision no: 2014/2613 (Kazancı).

50 Yağcıoğlu (n 1) 1224. Voir 19e Chambre civile de la Cour de cassation datée du 26.09.2018 dossier no: 2017/4080 décision no: 2018/4534 (Kazancı).

51 Huguenin (n 4) N 1245; Rieble (n 1) § 338 Rn 5; en droit suisse dans le cas où les arrhes sont imputables sur la créance principale Bernhard Berger, *Allgemeines Schuldrecht* (3e édition Stämpfli Verlag 2018) N 1825.

52 Dans le cas de l'exercice de droit de résiliation réservé dans le contrat, le sort des arrhes est soumis aux dispositions pertinentes du contrat. Voir 13e Chambre civile de la Cour de cassation turque datée du 18.04.2019 dossier no 2016/10686 décision no 2019/5130 (Kazancı)

restitution des arrhes[53] tandis que dans le cas de la résiliation elles seront imputées en cas d'exigence des dommages-intérêts résultant de l'inexécution. À notre avis en cas de résolution le bénéficiaire doit restituer les arrhes par principe conformément aux dispositions relatives à l'enrichissement illégitime[54].

Si l'obligation principale du débiteur (verseur) s'éteint à cause de l'impossibilité non imputable au débiteur selon l'art 136 COT ou l'obstacle à l'exécution est imputée au bénéficiaire les arrhes doivent être restituées au verseur[55]. Dans les cas susmentionnés la base juridique de la restitution des arrhes est controversée. Une opinion prétend qu'elle s'effectuera conformément aux dispositions du contrat[56]. En revanche, il y a aussi des auteurs soutenant que la partie libérée doit les restituer conformément aux dispositions relatives à l'enrichissement illégitime[57]. À notre avis, dans le cas de l'impossibilité non imputable au débiteur la restitution sera exécutée selon le second alinéa de l'art. 136 COT se référant aux règles de l'enrichissement illégitime. Toutefois, il convient de noter que dans ce cas en effet il ne s'agit pas d'un enrichissement illégitime au sens propre du terme et que cette restitution découle de loi[58]. Dans le cas de l'impossibilité imputable au bénéficiaire la restitution sera exécutée conformément aux dispositions relatives de contrat.

Si le contrat est résilié par une résiliation d'un commun accord, les dispositions de cette convention seront déterminantes pour la restitution des arrhes. Toutefois, si les volontés des parties sur la manière de remboursement ne sont pas comprises le sort des arrhes sera déterminée en fonction des conséquences juridiques de résolution[59].

53 Dans le même sens Oğuzman et Öz (n 6) N 1639. Voir 19ᵉ Chambre civile de la Cour de cassation datée du 09.05.2000 dossier no: 2000/1511 décision no: 2000/3592 (Kazancı).

54 Dans le même sens Düzceer (n 13) 352. Il convient de noter que la base légale de restitution des prestations accomplies est controversée dans la doctrine. Pour plus d'explications voir Mustafa Göktürk Yıldız, *Türk Borçlar Kanunu'nun Genel Hükümlerine Göre Borçlu Temerrüdünün Şartları ve Sonuçları* (On İki Levha 2020) 250- 266. Il convient de noter que le bénéficiaire peut compenser son obligation de restitution avec les dommages-intérêts découlant de la résolution. Voir Berger (n 51) N 1825. Dans le cas où le versement des consiste en transfert de possession d'une chose dans le cas susmentionné la possession peut être restitué par voie d'action en revendication et/ou *condictio possessionis*. Voir ci-dessus note 26.

55 Saymen et Elbir (n 6) 829-830; Düzceer (n 13) 352; Feyzioğlu (n 6) 377; Altop (n 3) 124; Mooser (n 2) Art 158 N 5-5a; dans le même sens Tekinay et Akman et Burcuoğlu et Altop (n 6) 340; Widmer et Constantini et Ehrat (n 9) Art 158 N 8; Pellanda (n 4) Art 158 N 6; Eren et Dönmez (n 12) M 177 N 6. Voir aussi 13ᵉ Chambre civile de la Cour de cassation turque datée du 13.05.2019 dossier no: 2016/23841 décision no: 2019/6082; 13ᵉ Chambre civile de la Cour de cassation turque datée du 31.05.2017 dossier no:2016/31227 décision no: 2017/6741 (Kazancı). *Berger* prétend justement que dans le cas où le verseur exige ses dommages intérêts découlant de l'inéxecution imputable au bénéficiaire les arrhes seront retenues par le bénéficiaire qui va indemniser le verseur comme il faut. Voir Berger (n 51) N 1826.

56 Tekinay et Akman et Burcuoğlu et Altop (n 6) 340; Erdem (n 1) 27. *Yağcıoğlu* fonde la restitution sur les dispositions relatives à l'enrichissement illégitime dans le cas de l'impossibilité subséquente non imputable au débiteur [Yağcıoğlu (n 1) 1223] pendant qu'elle s'appuie sur les dispositions contractuelles en cas de l'obstacle à l'exécution imputable au bénéficiaire [Yağcıoğlu (n 1) 1227].

57 Düzceer (n 13) 352. Pour le cas où l'inexécution est imputable au bénéficiaire voir Oser et Schönenberger (n 3) Art 158 N 4; von Tuhr et Escher (n 5) 288.

58 Dans ce contexte le contenu de l'obligation de restitution sera determiné selon les dispositions relatives à l'enrichissement illégitime mais la durée de prescription sera dix ans aux termes de l'art. 146 du COT. Voir M. Kemal Oğuzman et M. Turgut Öz, *Borçlar Hukuku Genel Hükümler, Cilt I* (20ᵉ édition, Vedat 2022) N 1816.

59 Gottwald (n 12) § 337 Rn 5. L'avis de la majorité de la doctrine turco-suisse ne traite pas la possibilité de l'existence probable d'une clause portant sur la restitution dans cet accord et donc soutient que la restitution repose l'enrichissement illégitime. Voir Oser et Schönenberger (n 3) Art 158 N 4; von Tuhr et Escher (n 5) 287; Mooser (n 2) Art 158, N 5a; Widmer

Il est admis que le même résultat juridique se produit dans le cas où la prestation principale est prescrite[60].

2. Si les arrhes ne sont pas imputables sur la créance principale (contrairement à la présomption légale)

Si l'exécution de l'obligation principale du verseur devient impossible en raison d'une circonstance qui lui est imputable, en cas d'exigence des dommages intérêts aux termes de l'art. 112 du COT les arrhes remises en preuve de la conclusion du contrat qui ne sont pas imputables[61] seront retenues par le destinataire et restituées par principe lors de l'exécution des dommages-intérêts[62]. Cette conclusion juridique sera également valable dans le cas où le bénéficiaire réclame ses dommages-intérêts en renonçant à l'exécution de l'obligation à la suite de la demeure fautive du débiteur (verseur) dans un contrat bilatéral ou le contractant résilie le contrat pour lequel les arrhes ont été remises lors de sa conclusion en raison d'une violation du contrat par le verseur.

En présence d'autres obstacles à l'exécution et de la prescription de l'obligation principale les évaluations déjà faites ci-dessus à propos du sort des arrhes imputables s'appliquent également en ce qui concerne celui des arrhes non imputables[63].

E. La question de l'applicabilité du dernier alinéa de l'art 182 du COT

La question de savoir si le dernier alinéa de l'art. 182 du COT indiquant que le juge doit réduire les peines qu'il estime excessive doit également s'appliquer en matière des arrhes démesurées est controversée[64]. À notre avis, à moins que les parties au

et Constantini et Ehrat (n 9) Art 158 N 8; Erdem (n 1) 27; Yağcıoğlu (n 1) 1222.

60 Mooser (n 2) Art 158 N 5a; Pellanda (n 4) Art 158 N 6.

61 Si les parties ont exclu l'imputation des arrhes sur l'obligation principale, cette exclusion s'étend également à leur imputation sur les dommages-intérêts pour l'inexécution. Voir Gottwald (n 12).

62 Gottwald (n 12) § 338 Rn 3. En droit suisse dans le même sens Oser et Schönenberger (n 3) Art 158 N 4; von Tuhr et Escher (n 5) 288; par contre en ce qui concerne cette possibilité il y a aussi des auteurs s'opposant la restitution voir Gauch et Schluep et Emmenegger (n 1) N 3857, 3859; Pellanda (n 4) Art 158 N 1. Selon la plupart des arrêts de la Cour de cassation portant sur le second alinéa de l'art. 156 du CO no: 818, que la résiliation soit justifiée ou non, les arrhes doivent être restituées au verseur. Voir 19e Chambre civile de la Cour de cassation turque datée du 08.06.2017 dossier no: 2017/165 décision no: 2017/4720; 19e Chambre civile de la Cour de cassation turque datée du 19.01.2017 dossier no: 2016/5285 décision no: 2017/274; 19e Chambre civile de la Cour de cassation turque datée du 23.03.2004 dossier no: 2003/6039 décision no: 2004/3240 (Kazancı). Néanmoins il convient de noter que si l'objet des arrhes non imputables est l'argent, les dommages-intérêts résultant de l'impossibilité subséquente et l'obligation de restitution des arrhes peuvent être retenues afin de les compenser à sa créance des dommages intérêts comp Erdem (n 1) 27; Altop (n 3) 124; Mooser (n 2) Art 158 N 5.

63 Dans ce contexte, il convient de noter que les notes en bas de pages (note 51-59) à propos du sort des arrhes imputables en présence d'autres obstacles à l'exécution et de la prescription de l'obligation principale sont également valables en ce qui concerne celui des arrhes non imputables.

64 Contre l'application de l'art. 182 du COT Gümüş (n 19) 1038. En droit suisse il y a des auteurs pour l'application dudit article. En ce qui concerne le cas où la remise des arrhes comporte la conclusion d'une clause pénale dans le même sens voir Mooser (n 2) Art 158 N 5. *Pellanda* et *Widmer et al.* soutiennent qu'une telle réduction ne sera possible que si les conditions de l'art. 78 du COT sont remplies en raison du fait qu'une prestation déjà fournie devrait le plus souvent être considérée comme une reconnaissance de l'adéquation ou une renonciation à la réduction. Voir Pellanda (n 4) Art 158 N 14 ; Widmer et Constantini et Ehrat (n 9) Art 158 N 5.

contrat n'attribuent une peine conventionnelle aux arrhes[65] les arrhes au sens de l'art. 177 du COT ne servent qu'à prouver la conclusion du contrat et cette nature présumée par le législateur exclut par principe l'application du dernier alinéa de l'art. 182 du COT.

II. Le dédit aux termes de l'art. 178 (Le dédit réel)

A. La disposition légale

Le dédit peut être défini comme une somme de l'argent fournissant au verseur le pouvoir de se départir du contrat sans raison valable (*licentia paenitendi)*[66]. L'art. 178 du COT portant le titre "*B. Le dédit*" est rédigé comme suit :

> "*Lorsqu'un dédit a été stipulé, chacun des contractants est censé pouvoir se départir du contrat, celui qui a versé la somme en l'abandonnant, celui qui l'a reçue en la restituant au double*." [67]

Selon cet article, le dédit est l'argent versé au moment de la conclusion du contrat[68] fournissant aux contractants le pouvoir de se départir du contrat[69]. Même si cette disposition ne traite qu'une somme d'argent comme dédit (comme c'est souvent le cas dans la pratique), la remise d'autre chose que de l'argent peut également pourvoir les parties de ce pouvoir[70]. En vertu de cette disposition supplétive[71] tant le verseur que l'autre partie au contrat (à la fois en restituant ce qui lui a été remis et en payant le même montant séparément) dans les mêmes conditions acquièrent le droit de se départir du contrat[72]. Dans ce contexte, par exemple, le paiement de 100 000 TL

65 S'il est convenu que les arrhes seront retenues par le bénéficiaire sans être imputées sur la créance principale (et le cas échéant sur les dommages-intérêts), cette somme versée acquiert le caractère de la peine conventionnelle déjà exécutée. Voir Yelkenci (n 49) 251. Dans ce cas, il est nécessaire de discuter de la question de savoir si le dernier alinéa de l'art. 182 du COT sera appliquée dans le cas où la peine conventionnelle a été déjà exécutée. Pour plus d'explications portant sur ce problème controversé voir Yelkenci (n 49) 409-412. À notre avis, une réduction de la peine n'est pas possible à moins que le débiteur n'affirme que la peine est excessive au plus tard au moment de l'exécution de peine. Dans la pratique la nécessité de la sécurité juridique pour le créancier l'exige. Dans le même sens Yasemin Kabaklıoğlu Arslanyürek, *Ceza Koşulu, Özellikle Zarar ve Tazminatla İlişkisi* (On İki Levha 2018) 95.

66 Becker (n 1) Art 158, N 6; Bucher (n 1) 517; Alfred Koller, "Reugelder bei Grundstückkaufverträgen" (2009) 145 (2) ZBJV 73, 73; Wolfer (n 19) N 18.

67 Le dernier alinéa de l'article 158 du Code suisse des obligations influençant fortement cette disposition, s'inspire de la tradition romaniste et de l'article 1590 du Code civil français. L'article 1590 du celui-ci est ainsi rédigé comme suit: "*Si la promesse de vendre a été faite avec des arrhes chacun des contractants est maître de s'en départir, celui qui les a données, en les perdant, Et celui qui les a reçu, en restituant le double.*"

68 Dans ce contexte, les accords autorisant chaque partie au contrat de promesse de vente immobilière à la résoudre, à condition que chaque contractant paie une certaine somme d'argent déterminée et généralement identique dans un certain délai plutôt qu'au moment de la conclusion du contrat, ne sont pas considérés comme ceux de dédit aux termes de l'art. 178 du COT. Voir Gauch et Schluep et Emmenegger (n 1) N 3870.

69 Gauch et Schluep et Emmenegger (n 1) N 3864; Huguenin (n 4) N 1241 Saymen et Elbir (n 6) 827.

70 Erdem (n 1) 29; Pellanda (n 4) Art 158 N 4 ; dans le même sens Widmer et Constantini et Ehrat (n 9) Art 158 N 11. *Yağcıoğlu* prétend que les arrhes peuvent consister seulement en argent. Voir Yağcıoğlu (n 1) 1230. Nos critiques à l'encontre du même avis de cet auteur concernant les arrhes sont également valables ici. Voir p 213 note 19.

71 Mosser (n 2) Art 158 N 6; Pellanda (n 4) Art 158 N 10.

72 Pour un exemple de cette stipulation voir 13ᵉ Chambre civile de la Cour de cassation datée du 10.02.2020 dossier no: 2017/6115 décision no: 2020/1756 (Kazancı). Dans ce contexte, s'il est stipulé que la somme d'argent versée (ou autre

à l'une des parties contractantes lors de la conclusion de cet acte juridique afin d'exercer le droit de se départir du contrat est considéré comme le dédit aux termes de l'art. 178. Comme on peut le voir, l'art. 178 du COT donne une sorte particulière du dédit[73].

Le dédit aux termes de l'art. 178 du COT doit être remis au moment de la conclusion du contrat[74]. En fait, le législateur prévoyant au premier alinéa de l'art. 177 du COT que l'argent versé "*lors de la conclusion du contrat"* doit être considéré comme des arrhes et non à titre le dédit adopte en même temps que le dédit aux termes de l'art. 178 du COT dont l'existence doit être prouvée par la partie alléguant[75] doit être remis au moment de la conclusion du contrat. Il convient alors de noter que le dédit aux termes de l'art. 178 du COT n'est pas promis mais exécuté (dédit réel)[76]. Le dédit réel ne doit pas nécessairement être remis à l'autre partie du contrat, et il est également possible de le bloquer en faveur du verseur auprès d'un tiers[77].

B. La nature et le contenu du dédit réel

L'accord concernant le dédit réel doit être conclu conformément à la forme du contrat auquel il se rapporte[78]. Ainsi, par exemple, si le dédit réel est stipulé en relation avec le contrat de vente d'un bien immobilier, cet accord doit être conclu sous forme authentique conformément au premier alinéa de l'art. 237 du COT[79]. Toutefois, l'exercice du droit de se départir du contrat obtenu par la remise de dédit, en règle générale, n'est soumis aucune forme de validité[80].

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chose remise) restera au bénéficiaire au cas où le verseur est fautif dans l'inexécution de l'obligation, il ne s'agit pas de dédit réel. En ce sens, Gauch et Schluep et Emmenegger (n 1) N 3871.

73 Dans ce contexte, afin d'éviter toute confusion conceptuelle on préfère exprimer cette notion "le dédit aux termes de l'art. 178 du COT" ou "le dédit réel" [pour cette dernière expression voir Engel (n 19) 861].

74 Saymen et Elbir (n 6) 827; Koller (n 66) 78. En raison de cette caractéristique, le dédit aux termes de l'art. 178 du COT (dédit réel) se distingue fondamentalement de la peine résolutoire réglementée par le dernier alinéa de l'art. 179 COT. Voir von Tuhr et Escher (n 5) 288; Walter Schoch, *Begriff, Anwendung und Sicherung der Konventionalstrafe nach der schweizerischem Recht* (Stämpfli&Cie 1935) 5; Osman Fazıl Berki, "Pey Akçesi, Rücu Tazminatı ve Cezai Şart (Mukavele Cezası) Etrafında Tetkikler" (1943) 17 (5) İBD 277, 281; Feyzioğlu (n 6) 379; Bucher (n 1) 518; Max Keller et Christian Schöbi, *Allgemeine Lehren des Vertragsrechts, Das schweizerische Schuldrecht* (3e édition Helbing & Lichtenhahn 1988) (n 74) 115; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (27e édition Yetkin 2022) N 3717; Eren et Dönmez (n 12) M 178 N 5; Engel (n 19) 861; Gauch et Schluep et Emmenegger (n 1) N 3868; Huguenin (n 4) N 1247; Widmer et Constantini et Ehrat (n 9) Art 158 N 14 ; Wuffli (n 4) Art 158 N 10 ; Öktem Çevik (n 26) 111.

75 Düzceer (n 13) 346; Eren (n 74) N 3719; Oğuzman et Öz (n 6) N 1646; Engel (n 19) 861; Yağcıoğlu (n 1) 1236.

76 Dans ce contexte, il n'est pas possible d'intenter une action en exécution de dédit réel. Oser et Schönenberger (n 3) Vorbem zu Art 160-163 N 14 ; Köksal Kocaağa, *Ceza Koşulu (Sözleşme Cezası)* (2e édition Yetkin 2018) 199.

77 Engel (n 19) 861; Erdem (n 1) 30; Yağcıoğlu (n 1) 1231.

78 Widmer et Constantini et Ehrat (n 9) Art 158 N 11; Gauch et Schluep et Emmenegger (n 1) N 3866; Erdem (n 1) 30; Pellanda (n 4) Art 158 N 5; Yağcıoğlu (n 1) 1233.

79 Voir L'assemblée plénière des chambres civiles de la Cour de cassation datée du 22.09.2022 dossier no: 2020/3-551 décision no: 2022/1147 (Kazancı). Comp Koller (n 66) 77-78.

80 Becker (n 1) Art 158 N 8; Mooser (n 2) Art 158 N 6. Il convient de noter que selon le dernier alinéa de l'art. 18 du Code de commerce turc, entre les commerçants la déclaration de résolution ou résiliation doivent être faites via un notaire ou par une lettre recommandée, un télégramme ou un système de courrier électronique enregistré à l'aide d'une signature électronique sécurisée. La nature de l'exigence de forme prévue par ledit article est controversée. Pour plus d'explications voir Yıldız (n 54) 16.

Étant donné qu'il sert fonctionnellement à éliminer le risque de perte du bénéficiaire contre la possibilité d'une résolution (ou d'une résiliation) du contrat sans motif, le dédit réel est généralement déterminé en tenant compte du dommage possible causé par les cas susmentionnés[81].

C. La fonction du dédit réel

Lorsque le dédit réel est remis, les parties obtiennent *facultas alternativa* concernant l'exécution de leurs obligations contractuelles ou la résolution (ou la résiliation) du contrat[82]. À cet égard, le dédit réel apporte, en général, une exception importante au principe *pacta sunt servanda*[83]. En effet, le contrat valablement conclu entre les parties doit les lier et cet acte juridique ne peut être résolu (ou résilié) librement[84]. En raison de sa nature exceptionnelle, l'existence de dédit -y compris le dédit réel aux termes de l'art. 178 du COT- nécessite au moins un accord implicite des contractants à cet égard à moins qu'elle découle de la nature de l'acte juridique[85].

Selon la première phrase de l'art. 178 du COT, toutes les deux parties sont censées à mettre fin au rapport contractuel en cas du versement du dédit réel. Dans le reste dudit article le sort de celui-ci est régi en fonction de la partie mettant fin au contrat. Ainsi, si le verseur se départ du contrat, le dédit réel sera abandonné au bénéficiaire; si le bénéficiaire met fin au contrat il sera obligé de remettre au verseur le double du dédit réel[86]. L'opportunité de cette disposition est controversée. Une opinion affirmant

81 Becker (n 1) Art 158 N 6; Widmer et Constantini et Ehrat (n 9) Art 158 N 11; Yağcıoğlu (n 1) 1232. En raison de cette nature, le dédit réel se différencie du dédit (faux) -que l'on rencontre dans la pratique, surtout en matière de vente- versé pour empêcher la naissance d'obligations contractuelles par non-exercice du droit d'option. Voir Koller (n 66) 74; Pellanda (n 4) Art 158 N 18a.

82 Düzceer (n 13) 347; Mooser (n 2) Art 158 N 6; Widmer et Constantini et Ehrat (n 9) Art 158 N 2; dans le même sens Wuffli (n 4) Art 158 N 7; Pellanda (n 4) Art 158 N 17; Feyzioğlu (n 6) 379; Erdem (n 1) 30; Yağcıoğlu (n 1) 1230. Voir aussi BGE 84 II 151. Cette faculté est également appelée "*facultate solutionis*". Voir Engel (n 19) 861. En revanche dans un arrêt du tribunal fédéral suisse le dernier alinéa de l'art. 158 COS (l'art. 178 du COT) s'applique dans le cas où il n'existe qu'une inexécution imputable au verseur même s'il n'y a aucune déclaration de volonté mettant fin au contrat. Voir BGE 84 II 156. En se référant à cet arrêt *Yağcıoğlu* prétend que ce résultat juridique ne peut être accepté que dans le cas où la partie violant son obligation ne met pas fin au contrat unilatéralement considérant qu'elle serait dans une position plus profitable par rapport à celle où elle s'abstenait de résoudre (ou résilier). Pour cela, voir Yağcıoğlu (n 1) 1234. Pour les critiques détaillés contre cet arrêt qui étend inutilement le champ d'application de la ladite disposition et entraîner des conséquences contraires à la nature du dédit réel voir İsmet Sungurbey, *Acemoğlu'nun "Tapulama Kanunu…" "Eşya Hukuku Meseleleri" Adlı Kitapları ve Serozan'ın Hukukçuluk Yöntemi Üstüne Notlar* (Sulhi Garan Matbaası Vârisleri Koll. Şti 1971) 85 note 13; Erdem (n 1) 31-32.

83 Il convient de noter que le dédit réel avait pour effet de renforcer la dette en droit grec. Il a acquis son caractéristique affaiblissant la nature contraignante du contrat à l'époque impériale du droit romain. Voir Andreas Schwarz, *Borçlar Hukuku Dersleri*, *I. Cilt,* Traducteur: Bülent Davran (Kardeşler Matbaası 1948) 262; Saymen et Elbir (n 6) 828; Kenan Tunçomağ, *Türk Hukukunda Cezai Şart* (Baha Matbaası 1963) 31; Erdem (n 1) 30.

84 Dans ce contexte, il convient de rappeler que c'est le principe *pacta sunt servanda* qui est à la base de la présomption que l'argent versé lors de la conclusion du contrat n'est pas à titre de dédit réel. Voir p 210-211.

85 Becker (n 1) Art 158 N 6; dans le même sens Schoch (n 74) 5; Tunçomağ (n 83) 31. Pour une disposition contractuelle expresse portant sur le dédit réel voir 19e Chambre civile de la Cour de cassation datée du 11.03.2003 dossier no: 2002/249 décision no: 2003/2011 (Kazancı).

86 Le fait que toutes les deux parties obtiennent le droit de mettre fin au rapport contractuel à la suite du versement par un contractant distingue également le dédit réel de la peine résolutoire. Voir Tunçomağ (n 83) 31; Bucher (n 1) 518; Oğuzman et Öz (n 6) N 1651; Kocaağa (n 76) 200; Couchepin (n 28)1118; Widmer et Constantini et Ehrat (n 9) Art 158 N 14; Gauch et Schluep et Emmenegger (n 1) N 3868; Huguenin (n 4) N 1247; Wuffli (n 4) Art 158 N 10; Öktem Çevik (n 26) 111.

la non-conformité de cet article aux usages de la vie commerciale soutient que le droit de se départir du contrat du bénéficiaire ne devrait pas être spontanément admis et que cela ne peut être cas qu'en présence de la volonté des parties dans ce sens[87]. Un autre avis qui est plus justifié s'y oppose. Selon elle, en accordant le droit de se départir du contrat à celui qui doit attendre que l'autre partie mette fin au rapport contractuel, on constate que le législateur s'efforce d'assurer une égalité et que ce désir de parité trouvant son écho surtout dans les possibilités de résiliation protégées dans la mesure le plus large possible dans les contrats de durée est l'expression de l'intention du législateur de règlementer cette question[88]. Cependant, il convient de noter que bien que l'art. 178 du COT donne l'impression d'une disposition impérative, il est possible qu'une seule partie puisse se voir accorder le pouvoir de se départir du contrat et que l'autre partie puisse s'en priver l'exercice[89].

D. Les conditions d'exercice du droit de mettre fin au rapport contractuel

Pour les contrats instantanés le droit de mettre fin au rapport contractuel sans motif acquis par voie du versement du dédit réel peut être exercé au plus tard au début de l'exécution de l'obligation principale à moins que les parties n'aient convenu d'un délai spécial[90]. Pour les contrats de durées ce droit peut être exercé en tout temps sous réserve de l'art. 2 du CCT.

Pour mettre fin au contrat unilatéralement en exerçant un droit découlant de la loi ou du contrat, ledit article ne s'applique pas[91].

En cas de résolution ou résiliation du contrat pour lequel le dédit réel est versé, le destinataire de cette déclaration ne peut pas réclamer de dommages-intérêts en raison de résolution ou résiliation franchissant le montant du dédit réel[92] et ne peut pas non plus obliger l'ayant droit à exécuter son obligation en nature à moins que les parties

87 von Tuhr et Escher (n 5) 288; Engel (n 19) 861. Au contraire *Koller* soutient que dans la possibilité mentionnée, la volonté des parties est que les deux parties acquièrent le droit de mettre fin au contrat. Voir Koller (n 66) 78.

88 Eugen Bucher, 'Der Ausschluss dispositiven Gesetzesrechts durch vertragliche Absprachen-Bemerkungen zu den Erscheinungsformen dispositiver Rechtssätze', *Festgabe für Henri Deschenaux zum 70. Geburstag* (Freiburg /CH Universitätsverlag 1977) 249, 258; dans le même sens Widmer et Constantini et Ehrat (n 9) Art 158 N 11 ; Mooser (n 2) Art 158 N 6 En revanche bien qu'il soit d'accord avec cette opinion *Wolfer* allègue que si l'objet du dédit réel est une chose non fongible la présomption de l'art. 178 du COT ne s'applique pas. Voir Wolfer (n 19) N 146.

89 Bucher (n 1) 518 ; Feyzioğlu (n 6) 380; Erdem (n 1) 30.

90 Comp Oğuzman et Öz (n 6) N 1649; Erdem (n 1) 31; Helvacı (n 12) 254; Kocaağa (n 76) 200; Yelkenci (n 49) 253; Kadir Berk Kapancı, '*Dönme Cezası (TBK m. 179 / f. 3) ve Cayma Parası (TBK m. 178) Kavramları Arasında Kısa Bir Karşılaştırma',* (2016) 22 (2) MÜHFHAD 247, 253.

91 Oğuzman et Öz (n 6) N 1652; Kapancı (n 90) 262; Gümüş (n 19) 1039. Dans ce cas, le sort du dédit réel sera déterminé en fonction de la résolution ou de la résiliation du contrat. À moins qu'il n'y ait une convention entre les parties à cet égard, la résolution du contrat nécessite la restitution du dédit réel tandis que dans le cas de la résiliation par analogie du second alinéa de l'art. 177 du COT il sera imputé en cas d'exigence des dommages-intérêts résultant de l'inexécution. Voir aussi p 218-219.

92 Düzceer (n 13) 354; Feyzioğlu (n 6) 381; Tekinay et Akman et Burcuoğlu et Altop (n 6) 340; Erdem (n 1) 34; Huguenin (n 4) N 1249; Widmer et Constantini et Ehrat (n 9) Art 158 13 ; Kapancı (n 90) 257; Serozan (n 2) 216. Dans ce contexte, *Saymen et Elbir* considère le dédit réel comme une sorte de la peine conventionnelle (*arrha poenalis*). Voir Saymen et Elbir (n 6) 829. Comp 3^{e} Chambre civile datée du 31.05.2017 dossier no: 2017/2060 décision no: 2017/8732 (Kazancı).

ne se soient réservé ces droits[93]. Cependant, il est également soutenu dans la doctrine que ce principe devrait être limité par la règle de la bonne foi et que si la partie sachant que son contractant a encouru des charges importantes pour l'exécution du contrat ne s'y oppose pas mais met fin au contrat juste au moment de l'exécution, le destinataire de cette déclaration a le droit d'exiger l'exécution en nature ou l'indemnisation du dommage dépassant le montant du dédit[94].

E. Le sort du dédit réel en cas d'exécution, d'inexécution ou d'invalidité du contrat

Le sort du dédit réel dans le cas où le droit de mettre fin au contrat acquis par la remise du celui-ci n'est pas exercé est controversée. La majorité de la doctrine suisse soutient que la présomption concernant les arrhes est appliquée par analogie et que le bénéficiaire garde le dédit réel sauf usage local ou convention contraire[95]. Cependant, une opinion prétend que le dédit réel doit être restitué par principe[96]. Dans la doctrine, il est également affirmé qu'à la suite d'une évaluation des volontés de parties selon le principe de confiance il convient de décider qu'il s'agit d'un prix de risque ou une prestation partielle comptant[97]. À notre avis lorsque le droit de se départir de contrat du contrat n'est pas exercé il convient d'imputer le dédit réel sur la créance principale par analogie du second alinéa de l'art. 177 du COT a moins que les parties ne conviennent autrement[98].

Le dédit réel doit être restitué si le contrat est invalide (notamment pour cause d'un vice de forme ou de consentement) ou l'obligation principale découlant du contrat prend fin en raison d'impossibilité non imputable au débiteur[99]. Cette conséquence juridique devrait également s'appliquer au dédit réel perdant sa fonction en cas de résolution (ou résiliation) découlant soit du contrat soit de la loi[100] ou lorsque la prestation principale est prescrite[101]. Étant donné que le dédit est de l'argent dans la

93 Dans le même sens Düzceer (n 13) 354; Tekinay et Akman et Burcuoğlu et Altop (n 6) 340; dans le même sens Kılıçoğlu (n 37) 991.

94 Tekinay et Akman et Burcuoğlu et Altop (n 6) 341; Yağcıoğlu (n 1) 1240.

95 Bucher (n 1) 515-516; Keller et Schobi (n 74) 115; Wuffli (n 4) Art 158 N 9; Widmer et Constantini et Ehrat (n 9) Art 158 N 11; Pellanda (N 4) Art 158 N 18; Gauch et Schluep et Emmenegger (n 1) N 3864; Mooser (n 2) Art 158 N 7; comp Huguenin (n 4) N 1249. Il convient de rappeler que cette présomption règlementée par le second alinéa de l'art. 158 COS est rédigé comme suit:"*Sauf usage local ou convention contraire, celui qui a reçu les arrhes les garde sans avoir à les imputer sur sa créance*."

96 von Tuhr et Escher (n 5) 288; Oser et Schönenberger (n 3) Art 158 N 5; Kapancı (n 90) 254. En se référant aux disposition relatives à l'enrichissement illégitime Eren (n 74) N 3720; Eren et Dönmez (n 12) M 178 N 4.

97 Serozan (n 2) 216.

98 Oğuzman et Öz (n 6) N 1650; Halûk N. Nomer, *Borçlar Hukuku Genel Hükümler* (19e édition Beta 2023) N 233; Helvacı (n 12) 255; Bilgehan Çetiner et Andreas Furrer et Markus Müller-Chen, *Borçlar Hukuku Genel Hükümler* (2e édition On İki Levha 2022) 1643. Comp Düzceer (n 13) 353; Tekinay et Akman et Burcuoğlu et Altop (n 6) 341; Huguenin (n 4) N 1249; Erdem (n 1) 31; Yağcıoğlu (n 1) 1239.

99 Berki (n 74) 280-281; Bucher (n 1) 517; Mooser (n 2) Art 158 N 8 comp Engel (n 19) 861.

100 Erdem (n 6) 672-673 ; Yağcıoğlu (n 1) 1241; Widmer et Constantini et Ehrat (n 9) Art 158 N 12 dans le même sens von Tuhr et Escher (n 5) 288 note 8; Serozan (n 2) 220;

101 Dans le même sens Pellanda (n 4) Art 158 N 6.

plupart des événements naturels de la vie, cette restitution sera faite conformément, par principe, aux règles de l'enrichissement illégitime[102]. Toutefois, en cas de la survenance d'obstacles à l'exécution imputés au verseur, le dédit réel ne sera pas remboursé[103].

F. La question de l'applicabilité du dernier alinéa de l'art 182 du COT

La question de savoir si le dernier alinéa de l'art. 182 du COT concernant la réduction de la peine conventionnelle sera applicable au dédit réel est controversée. Le Tribunal fédéral suisse et la Cour de Cassation turque ainsi que l'opinion dominante dans la doctrine soutiennent que ledit article ne sera pas applicable au dédit (soit consensuel[104] soit réel[105])[106]. Cependant, certains auteurs prétendent que le dédit réel excessif peut être réduit par le juge conformément audit article[107]. À notre avis étant donné le dédit réel dont la nature se diffère fondamentalement de la peine conventionnelle en fournissant seulement aux parties le pouvoir de se départir du contrat au lieu de rester lié à celui-ci, il n'est pas possible de le déduire aux termes du dernier alinéa de l'art. 182 COT au motif que la somme est excessive même par analogie[108] à moins que les contractants n'attribuent une peine conventionnelle au dédit réel[109].

102 L'assemblée plénière des chambres civiles de la Cour de cassation datée du 22.09.2022 dossier no: 2020/ 3-551 décision no: 2022/1147 (Kazancı). Comp Widmer et Constantini et Ehrat (n 9) Art 158 N 12. Dans le cas où le versement du dédit réel consiste en transfert de possession d'une chose dans le cas susmentionné la possession peut être restitué par voie d'action en revendication et/ou *condictio possessionis*. Voir ci-dessus note 26.

103 Dans le même sens Berki (n 74) 280; Düzceer (n 13) 354; Mooser (n 2) Art 158 N 8; Pellanda (n 4) Art 158 N17a; Wuffli (n 4) Art 158 N 8; Feyzioğlu (n 6) 382; comp Serozan (n 2) 219.

104 BGer c. 30.06.2004, 4C.97/2004 E. 3.2.1.

105 L'assemblée plénière des chambres civiles de la Cour de cassation datée du 24.01.1970 dossier no: 1966/4-1348 décision no: 1970/50 (Kazancı). Pour les critiques détaillés contre cet arrêt Sungurbey (n 82) 87 note 13. L'auteur considère que l'objet de la stipulation litigeuse est *arrha poenalis* auquel l'art. 182 du COT peut s'appliquer conceptuellement.

106 Pour le dédit réel spécialement voir Berki (n 74) 281; Düzceer (n 13) 347; Feyzioğlu (n 6) 381; Eren (n 74) N 3721; Gauch et Schluep et Emmenegger (n 1) N 3867; Widmer et Constantini et Ehrat (n 9) Art 158 N 11; Mooser (n 2) Art 158 N 8; Erdem (n 6) 678; Eren et Dönmez (n 12) M 178 N 5; Pellanda (n 4) Art 158 N 19; Öktem Çevik (n 26) 111 ; Kapancı (n 90) 260.

107 Koller (n 66) 82; Serozan (n 2) 228;Tekinay et Akman et Burcuoğlu et Altop (n 6) 341.

108 Certains auteurs refusant la réduction du dédit réel excessif par le juge mettent l'accent sur le fait que le débiteur n'est pas obligé d'utiliser le droit de se départir du contrat [*volenti non fit injuria (le consentement élimine l'illégalité)]* Widmer et Constantini et Ehrat (n 9) Art 158 N 11 ; Mooser (n 2) Art 158 N 8.

109 Le dédit réel est attribué à la peine conventionnelle dans le cas où les parties conviennent que le dédit réel est retenu en cas de l'inexécution de l'obligation principale par le débiteur (verseur). Voir Yelkenci (n 49) 252. À notre avis, une réduction de la peine n'est pas possible à moins que le débiteur n'affirme que la peine soit excessive au plus tard au moment de l'exécution de peine. Dans la pratique la nécessité de la sécurité juridique pour le créancier l'exige. Voir aussi p 221 note 65.

III. La peine résolutoire

A. La disposition légale

La peine résolutoire est règlementée par le dernier alinéa de l'art. 179 COT comme suit:

"Le débiteur conserve la faculté de prouver qu'il a le droit de résoudre ou résilier le contrat en payant la peine stipulée."

B. La nature et le contenu

En convenant de la peine résolutoire, le débiteur acquiert le droit de mettre fin au contrat sans aucun motif[110] en versant une somme d'argent ou remettant une autre chose[111]. De ce fait, cette peine confère au débiteur *facultas alternativa* concernant l'exécution de ses obligations contractuelles ou la résolution (ou bien la résiliation) du contrat[112]. Bien que ledit article ne l'accorde qu'au débiteur, il est possible de fournir ce pouvoir au créancier dans le contrat[113].

Contrairement à la peine conventionnelle[114] visant à garantir l'obligation principale en constituant une sanction la peine résolutoire soulage la position du débiteur en lui permettant de se débarrasser de son obligation principale unilatéralement[115]. Bien qu'elle ait une fonction similaire au dédit aux termes de l'art. 178 du COT (dédit réel) en ce

110 von Tuhr et Escher (n 5) 283; Engel (n 19) 865; Gauch et Schluep et Emmenegger (n 1) 3810; Couchepin (n 28) N 1114; Wuffli (n 4) Art 160 N 18; Widmer et Constantini et Ehrat (n 9) Art 160 N 25.

111 Erdem (n 1) 37.

112 Mooser (n 2) Art 160 N 15; Erdem (n 1) 38. *Yağcıoğlu,* souligne qu'il n'existe pas d'une obligation alternative dans ce cas. Voir Burcu Yağcıoğlu *Ceza Koşulu (Cezai Şart)* (2ᵉ édition Seçkin 2022) 80. Contra Schoch (n 74) 4-5; Pellanda (n 4) Art 160 N 45; comp Bruno von Büren, *Schweizerisches Obligationenrecht, Allgemeiner Teil* (Schultess 1964) 410. S'il s'agit d'une peine résolutoire il existe une *"facultate solutionis"* Voir Secrétan (n 18) 100; Becker (n 1) Art 160 N 36 dans le même sens Feyzioğlu (n 6) 395. Dans la possibilité susmentionnée, si l'existence d'une obligation alternative est admise, au cas où le débiteur n'exécute ni l'obligation principale ni la peine résolutoire il y aura une conséquence juridique telle que l'introduction d'une action alternative se produira et cette situation ne sera pas conforme au but de la peine résolutoire. Voir Tekinay et Akman et Burcuoğlu et Altop (n 6) 352. *Serozan,* d'autre part, est d'avis que si la peine résolutoire est convenue, il y a un concours électif, pas de *facultas alternativa* au sens réel. Pour cela voir Serozan (n 2) 218.

113 Oğuzman et Öz (n 6) N 1610; Kocaağa (n 76) 145-146; Erdem (n 1) 37.

114 Bien que le terme consacré soit "*la peine résolutoire",* on voit que la doctrine utilise également l'expression "l*a peine exclusive"* au lieu de cette notion réglementée par le dernier alinéa de l'art. 179 COT. Voir Oser et Schönenberger (n 3) Art 160 N 7; Tunçomağ (n 83) 47; Bucher (n 1) 529-530; Huguenin (n 4) N 1273; Wuffli (N 4) Art 160 N 18 dans le même sens Widmer et Constantini et Ehrat (n 9) Art 160 N 25; Pellanda (n 4) Art 160 N 46. *Couchepin* utilise justement l'expression "*la peine exclusive*" uniquement pour les stipulations selon lesquelles le créancier ne peut demander la peine qu'en cas d'inexécution de l'obligation et soutient que cette expression n'est pas synonyme de peine résolutoire. Voir Couchepin (n 28) N. 1114 note 1056.

115 Schoch (n 74) 5 (spécialement note 1); Keller et Schöbi (n 74) 113; von Büren (n 112) 410; Gauch et Schluep et Emmenegger (n 1) N 3810; Erdem (n 1) 40; Couchepin (n 28) N 1126 ; Mooser (n 2) Intro Art. 158-163 CO N 7a; Widmer et Constantini et Ehrat (n 9) Art 160 N 25; Kocaağa (n 76) 144-145; Yağcıoğlu (n 112) 80-81; Eren et Dönmez (n 12) M 179 N 24; Pierre Tercier et Pascal Pichonnaz et H. Murat Develioğlu, *Borçlar Hukuku Genel Hükümler* (2ᵉ édition On İki Levha 2020) N 1376; dans le même sens Çetiner et Furrer et Müller-Chen (n 98) N 1638. En revanche, certains auteurs considèrent la peine résolutoire comme une sorte de peine conventionnelle. Voir Secretan (n 20) 100; Oser et Schönenberger (n 3) Art 160 N 7; Becker (n 1) Art 160 N 36; Saymen et Elbir (n 6) 840; Tunçomağ (n 83) 47; Huguenin (n 4) N 1255. Dans un cas où il est entendu qu'il ne s'agit pas de résolution ni de la résiliation, la Cour de cassation turque a jugé que les conditions de la peine résolutoire étaient remplies. Voir 11ᵉ Chambre civile de la Cour de cassation turque datée du 12.05.2022 dossier no: 2021/1520 décision no: 2022/3797 (Kazancı).

qui concerne l'exception qu'elle apporte au principe de *pacta sunt servanda*[116], elle s'en distingue en franchissant seulement au débiteur le droit de résoudre (ou résilier) librement le contrat[117], en n'étant pas tenue de s'exécuter au moment de la conclusion du contrat[118] et en démontrant d'une façon précise la volonté de ne pas exécuter l'obligation principale[119].

C. Les conditions d'exercice du droit de mettre fin au rapport contractuel

Le débiteur peut se départir du contrat au moment où il paie ou offre (en d'autres termes ''fait une proposition d'exécution dont le refus entraînerait la demeure du créancier'') d'exécuter la somme stipulée[120]. Dans le cas où le débiteur manifeste sa volonté de résoudre (ou résilier) le contrat sans verser la peine le créancier ne peut exiger que l'exécution de la peine en lui mettant en demeure[121].

Pour mettre fin au contrat unilatéralement en exerçant un droit découlant de la loi ou du contrat, il n'est pas nécessaire de payer la peine stipulée[122].

Le délai dans lequel le débiteur peut exercer le droit découlant de ce contrat accessoire[123] est controversé dans la doctrine. Alors qu'une opinion de la doctrine soutient que le droit de se départir du contrat (contrairement à celui fourni par le versement du dédit réel) peut être exercé par le débiteur à tout moment[124], une autre

116 Saymen et Elbir (n 6) 840; Keller et Schöbi (n 74) 113; Widmer et Constantini et Ehrat (n 9) Vorbemerkungen zu Art158-163 N 1; Gauch et Schluep et Emmenegger (n 1) N 3811; Wuffli (n 4) Art 160 N 18; Eren et Dönmez (n 12) M 179 N 24.

117 Pour un exemple d'une clause sur la peine résolutoire voir l'assemblée plénière des chambres civiles de la Cour de cassation datée du 12.10.2021 dossier no: 2017/19-2736 décision no: 2021/1218 (Kazancı). Dans ce contexte, les accords autorisant chaque partie au contrat de promesse de vente immobilière à la résoudre, à condition que chacun paie une certaine somme d'argent déterminée et généralement identique dans un certain délai plutôt qu'au moment de la conclusion du contrat, ne sont pas considérés comme ceux de la peine résolutoire règlementée par le dernier alinéa de l'art. 179 du COT. Voir Gauch et Schluep et Emmenegger (n 1) N 3870. Il convient de noter que les parties peuvent conférer le droit de se départir du contrat aussi au créancier en cas d'accord. Voir Kocaağa (n 76) 145-146.

118 Secretan (n 20) 104; Schoch (n 74) 5; Tunçomağ (n 83) 31; von Büren (n 112) 411; Engel (n 19) 861; Kocaağa (n 76) 199; Mooser (n 2) Intro Art. 158-163 N 5; Couchepin (n 28) N 1116-1118; Kılıçoğlu (n 37) 1004.

119 Yağcıoğlu (n 112) 87. Pour l'accentuation de la dernière différence susmentionnée voir Feyzioğlu (n 6) 396; Tekinay et Akman et Burcuoğlu et Altop (n 6) 353.

120 Tekinay et Akman et Burcuoğlu et Altop (n 6) 352-353; Oğuzman et Öz (n 6) N 1611; Kocaağa (n 76) 146; Hatemi et Gökyayla (n 26) 406; Öktem Çevik (n 26) 106. Cette nécessité est la conséquence de la *facultas alternativa*. Voir Rona Serozan, *İfa, İfa Engelleri, Haksız Zenginleşme* (7e édition Filiz 2016) §7 Rn 26. Il convient de noter que selon le dernier alinéa de l'art. 18 du Code de commerce turc, entre les commerçants la déclaration de résolution ou résiliation doivent être faites via un notaire ou par une lettre recommandée, un télégramme ou un système de courrier électronique enregistré à l'aide d'une signature électronique sécurisée. La nature de l'exigence de forme prévue par ledit article est controversée. Pour plus d'explications voir Yıldız (n 54) 16.

121 Couchepin (n 28) N 1122.

122 Erdem (n 1) 38; Kapancı (n 90) 262; Oğuzman et Öz (n 6) N 1613; Kocaağa (N 76) 148; Öktem Çevik (n 26) 106; Yağcıoğlu (n 112) 78-79. Pour les exemples des arrêts où cet constat est accentué voir 15e Chambre civile de la Cour de cassation datée du 22.01.2015 dossier no: 2014/6685 décision no: 2015/335; 15e Chambre civile de la Cour de cassation turque datée du 04.07.2014 dossier no: 2013/5604 décision no: 2014/4719; 15e Chambre civile de la Cour de cassation turque datée du 26.11.2007 dossier no: 2007/5435 décision no: 2007/7543. Dans un autre arrêt, la Cour de cassation a jugé que la résiliation en raison de faute mutuelle qui ne pouvait pas être qualifié d'injuste ne conférait pas aux parties le droit de réclamer la peine résolutoire. Voir 15e Chambre civile de la Cour de cassation turque datée du 15.01.2020 dossier no: 2019/1848 décision no: 2020/77 (Kazancı)

123 Elce Tutar, *Dönme Cezası* (Turhan 2016) 82; Kapancı (n 90) 249. Lorsque le contrat est nul, l'accord sur la peine résolutoire n'est pas valable. Voir 6e Chambre civile de la Cour de cassation turque datée du 31.01.2023 dossier no: 2022/353 décision no: 2023/351(Kazancı).

124 Kocaağa (n 76) 200; Oğuzman et Öz (n 6) N 1651.

allègue que ce droit peut être exercé jusqu'à l'exécution de l'obligation principale, en s'appuyant sur la similarité entre la peine résolutoire et le dédit réel[125]. Étant donné que le dédit réel et la peine résolutoire ne se diffèrent qu'en trois points cités ci-dessus nous nous rejoignons au principe indiqué par la seconde opinion et nous nous referons à notre évaluation concernant sur cette question aux termes du dédit réel[126].

Dans le cas où une peine résolutoire est convenue, les dommages intérêts découlant la résolution (ou résiliation) et franchissant le montant stipulé ne peuvent être exigés, à moins que les parties ne se soient mises d'accord à cet égard[127]. Cette conséquence juridique admise par la doctrine confirme que la peine résolutoire n'est pas une sorte de peine conventionnelle (comp le second alinéa de l'art 180 COT).

La conséquence juridique de l'absence d'exercice du droit de se départir du contrat[128] est controversée dans la doctrine. Une opinion soutient qu'au cas où le débiteur s'abstient de résoudre (ou résilier) le rapport contractuel le créancier peut choisir de réclamer l'exécution de l'obligation principale ou le paiement de la peine[129]. À notre avis, dans un contrat où la peine résolutoire est stipulée le créancier ne peut exiger que l'exécution de l'obligation principale même si le débiteur n'exerce pas son droit de droit de départ[130]. En fait comme mentionné ci-dessus, c'est le débiteur à qui *facultas alternativa* concernant l'exécution de leurs obligations contractuelles ou la résolution (ou la résiliation) du contrat a été conférée. Dans ce contexte la réclamation du créancier portant sur l'exécution peut être paralysée par le paiement de la peine tant que l'exercice de droit de mettre fin au contrat fondé sur cette stipulation est possible[131].

125 Erdem (n 1) 38; Tutar (n 123) 83.

126 Voir p 224.

127 Berki (n 74) 294 ; Tunçomağ (n 83) 47; Feyzioğlu (n 6) 396; Erdem (n 1) 39; Gauch et Schluep et Emmenegger (n 1) N 3815 note 48; Huguenin (n 4) N 1273; Widmer et Constantini et Ehrat (n 9) Art 160 N 25 ; Mooser (n 2) Art 160 N 15; Kocaağa (n 76) 151-152 ; Yağcıoğlu (n 112) 81; Kapancı (n 90) 257; Tutar (n 123) 93-94. Dans le même sens 15e Chambre civile de la Cour de cassation turque datée du 22.05.2015 dossier no: 2014/6689 décision no: 2015/2707; 15e Chambre civile de la Cour de cassation turque datée du 28.09.2010 dossier no: 2010/4150 décision no: 2010/4834 (Kazancı).

128 À ce stade, il est important de déterminer à partir de quel moment il peut être mentionné que le droit de se mettre fin au contrat n'a pas été exercé. Si l'exercice de ce droit est limité dans le temps et le délai convenu est dépassé sans résolution (ou résiliation) il est considéré non exercé. Si son exercice n'est pas limité dans le temps, le débiteur peut utiliser son droit pour les contrats instantanés au plus tard au début de l'exécution de l'obligation principale; en ce qui concerne ceux de durées l'exercice est possible en tout temps sous réserve de l'art. 2 du CCT à moins qu's'il ne ressort de non exercice une volonté de renonciation. En outre il convient de noter que dans le cas où l'exercice n'est pas limité dans le temps le créancier peut fixer un délai en ce qui concerne l'exercice de droit afin de procurer la sécurité juridique. En cas de dépassement du délai sans résolution (ou résiliation), le droit de mettre fin au contrat est considéré non exercé. Comp Wolfer (n 19) N 238-241.

129 Becker (n 1) Art 160 N 36; Tekinay et Akman et Burcuoğlu et Altop (n 6) 352; Couchepin (n 28) N 1124. Selon le dernier auteur, le créancier dispose d'une alternative proche qu'il acquiert en cas de conclusion de la peine conventionnelle sous la différence que le débiteur peut imposer son choix en payant la peine ou en exécutant la prestation. Selon *Koller*, considérant la peine résolutoire comme une sorte de la peine alternative le créancier a le droit d'exiger alternativement l'obligation principale ou la peine. Voir Alfred Koller, *Schweizerisches Obligationenrecht* (Stämpfli Verlag 2023) § 81 N 65-66. En revanche certains auteurs prétendent que le créancier ne peut prétendre que la peine résolutoire et qu'il renonce à l'exécution de l'obligation promise ou aux dommages intérêts. Voir Widmer et Constantini et Ehrat (n 9) Art 160 N 25 ; dans le même sens Eren (n 74) N 3696; Eren et Dönmez (n 12) M 179 N 23.

130 Kocaağa (n 76) 147 comp Gümüş (n 19) 1036. Pour le même constat à propos de la peine résolutoire voir 15e Chambre civile de la Cour de cassation turque datée du 19.04.2021 dossier no: 2020/2403 décision no: 2921/1785 (Kazancı). En outre, le créancier mettant fin au contrat ne peut pas exiger du débiteur le paiement de la peine résolutoire. Pour ce constat voir aussi 19e Chambre civile de la Cour de cassation turque datée du 16.06.2015 dossier no: 2014/12093 décision no: 2015/8929 (Kazancı).

131 Comp Tekinay et Akman et Burcuoğlu et Altop (n 6) 353 ; Koller (n 129) § 81 N 66; Tutar (n 123) 83.

D. La peine résolutoire atypique présumée par la loi: Le deuxième alinéa de L'art. 446 du COT

Si les parties ont convenu d'une peine, c'est le débiteur qui est tenu de prouver qu'il s'agit également d'une peine résolutoire. En d'autres termes, c'est la peine contractuelle qui est la présumée mais pas la peine résolutoire[132]. En revanche, la peine convenue pour le comportement du travailleur contraire à l'interdiction de concurrence à son employeur après la fin du contrat de service est présumée comme une peine résolutoire par la loi[133]. Le deuxième alinéa de l'art. 446 du COT concernant cette stipulation[134] est rédigé comme suit :

"Il (le travailleur) peut, lorsque la contravention est sanctionnée par une peine conventionnelle et sauf accord contraire, se libérer de la prohibition de faire concurrence en payant le montant prévu; toutefois, il est tenu de réparer le dommage qui excéderait ce montant."

En vertu de cette disposition supplétive[135], renversant la présomption légale règlementée par le dernier alinéa de l'art. 179 du COT, le créancier (employeur) pourra exiger non seulement la peine résolutoire, mais également l'indemnisation du dommage supplémentaire découlant de la période avant la libération[136] conformément au second alinéa de l'art. 180 COT[137]. Selon le dédit alinéa, il suffit que le travailleur paie uniquement la somme stipulée pour libérer de cette obligation et il n'est pas nécessaire de faire une déclaration explicite dans ce sens[138].

132 Erdem (n 1) 37; Couchepin (n 28) N 1115; Mooser (n 2) Art 160 N 15; Öktem Çevik (n 26) 105; Yağcıoğlu (n 112) 78. Dans ce contexte, Becker (n 1) Art 160 N 37.

133 Gauch et Schluep et Emmenegger (n 1) N 3812; Huguenin (n 4) N 1273; Widmer et Constantini et Ehrat (n 9) Art 160 N 25; Erdem (n 1) 37-38; Couchepin (n 28) N 1115; Mooser (n 2) Art 160 N 15; Pellanda (n 4) Art 160 N 48. Cependant, au regard de la sanction contractuelle convenue sur l'interdiction de concurrence entre deux commerçants, le débiteur qui prétend avoir le droit de résilier cette transaction légale en payant le montant spécifié dans la clause pertinente est tenu d'en apporter la preuve. Dans le même sens Kocaağa (n 76) 151.

134 Pour un exemple de cette stipulation voir 11[e] Chambre civile de la Cour de cassation turque datée du 07.11.2022 dossier no: 2021/7273 décision no: 2022/7857 (Kazancı). Certains auteurs s'appuient également sur le dernier alinéa de l'art. 446 du COT pour indiquer que le créancier ne peut pas exiger -par principe- de l'abstention de l'activité concurrentielle interdite en même temps que l'exécution de la peine. Voir Bucher (n 1) 530; Wuffli (n 4) Art 160 N 18. À notre avis ledit alinéa auquel il n'est pas nécessaire de se référer dans ce contexte est rédigé comme suit: "*L'employeur peut exiger, s'il s'en est expressément réservé le droit par écrit, outre la peine conventionnelle et les dommages-intérêts supplémentaires éventuels, la cessation de la contravention, lorsque cette mesure est justifiée par l'importance des intérêts lésés ou menacés de l'employeur et par le comportement du travailleur*. "

135 Sarper Süzek, "*Yeni Türk Borçlar Kanunu Çerçevesinde İşçinin Rekabet Etmeme Borcu*" (2014) LXXII (2) İÜHFM 457, 463; İrem Yayvak Namlı, *İş Hukuku'nda Cezai Şart* (On İki Levha 2019) 534.

136 Gauch et Schluep et Emmenegger (n 1) N 3806. A cet égard la peine résolutoire aux termes du deuxième alinéa de l'art. 446 du COT diffère de celle du dernier alinéa de l'art. 179 COT. Voir Pellanda (n 4) Art 160 N 48. Kocaağa (n 76) 150 ; Yağcıoğlu (n 112) 82.

137 Voir Süzek (n 135) 463; Yayvak Namlı (n 135) 535.

138 Kocaağa (n 76) 151; Yayvak Namlı (n 135) 535.

E. Les dispositions légales interdisant ou limitant la peine résolutoire

Tandis que la convention de la peine conventionnelle n'est pas admise dans certains cas[139] et le législateur limite parfois le montant de cette peine comme dans la vente avec paiements préalables[140].

F. La question de l'applicabilité du dernier alinéa de l'art 182 du COT

La question de savoir si le dernier alinéa de l'art. 182 COT autorisant au juge à réduire la peine conventionnelle sera appliquée par analogie à la peine résolutoire est controversée. Alors qu'une opinion s'oppose à l'application par analogie dudit article en ce qui concerne la peine résolutoire[141], une autre l'admet[142]. À notre avis étant donné la peine résolutoire dont la nature se diffère fondamentalement de la peine conventionnelle en fournissant seulement au débiteur le pouvoir de se départir du contrat au lieu de rester lié à celui-ci, il n'est pas possible de le déduire aux termes du dernier alinéa de l'art. 182 COT au motif que la somme est excessive même par analogie à moins que les contractants n'attribuent une peine conventionnelle a la peine résolutoire. En revanche si les conditions citées par le dernier alinéa de l'art. 182 COT sont remplies la peine résolutoire règlementée par le second alinéa de l'art. 446 COT peut être réduite par le juge[143].

G. L'interprétation de la clause pénale

Tout doute quant à la question de savoir si une peine conventionnelle ou une peine résolutoire est stipulée dans un contrat doit être résolu par l'interprétation de la clause contractuelle. Dans ce contexte, alors que la disposition visant à renforcer la position du créancier doit être considérée comme une peine conventionnelle, celle

139 La peine résolutoire convenue pour la révocation ou répudiation du contrat de mandat selon l'art. 512 du COT n'est pas valable dans le cas où la révocation ou répudiation est justifiée et effectuée en temps opportun. Dans ce sens Koller (n 129) §80 N 21. En outre selon le second alinéa de l'art 119 CCT en ce qui concerne des fiançailles, la loi n'accorde pas d'action en exigeant le dédit promis pour l'abstention de se marier. Pour plus d'explications en ce qui concerne la relation entre le dédit et les fiançailles voir Etem Saba Özmen, "Nişanın Bozulmasında Cayma Akçası ve Cezai Şart (M.K 83 Madde Değişikliği)" (1995) (4) TBBD 520-577.

140 Le second alinéa de l'art. 269 du COT est rédigé comme suit: " *Le montant du dédit qu'il est prévu de verser par l'acheteur en cas de la résolution du contrat est déterminé en tenant compte de la nature de la situation et du délai écoulé entre la conclusion du contrat et la résolution. Toutefois, ce montant ne peut être inférieur à deux pour cent et supérieur à cinq pour cent du total des créances du vendeur. L'acheteur peut demander que la partie des paiements effectués au-delà des frais de retrait lui soit restituée, ainsi que le produit.*"

141 von Büren (n 112) 411; Oğuzman et Öz (n 6) N 1614; Gauch et Schluep et Emmenegger (n 1) N 3867; Widmer et Constantini et Ehrat (n 9) Art 160 N 25; Mooser (n 2) Art 160 N 15; Kocaağa (n 76) 152; Erdem (n 1) 40; Hatemi et Gökyayla (n 26) 406; Öktem Çevik (n 26) 106; Yağcıoğlu (n 112) 82; Kapancı (n 90) 260; Yelkenci (n 49) 259; 15e Chambre civile de la Cour de cassation datée du 11.02.2019 dossier no: 2018/1639 décision no: 2019/511; 15e Chambre civile de la Cour de cassation datée du 14.02.2002 dossier no: 2001/4830 décision no: 2002/741 (Kazancı) dans le même sens en tenant compte aussi de l'exception du premier alinéa de l'art. 27 COT concernant la contradiction aux mœurs Çetiner et Furrer et Müller-Chen (n 98) N 1640 pour l'application du premier alinéa de l'art. 27 COT en ce qui concerne voir 23e Chambre civile de la Cour de cassation datée du 30.11.2017 dossier no: 2015/9232 décision no: 2017/3536 (Kazancı).

142 Serozan (n 2) 227; Tekinay et Akman et Burcuoğlu et Altop (n 6) 353; Feyzioğlu (n 6) 296; Berger (n 51) N 1813, Wolfer (n 19) N 294 ; Tutar (n 123) 112.

143 Pellanda (n 4) Art 160 N 48.

destiné à affaiblir l'effet contraignant du rapport contractuel est de nature de peine résolutoire[144]. Si l'intention des parties réelle des parties ne peut pas être déterminée il faut admettre l'existence de la peine conventionnelle en s'appuyant de la présomption prévue par le premier alinéa de l'art. 179 COT[145].

La conclusion

Selon le premier alinéa de L'art. 177 du COT, une somme d'argent versée par l'une des parties lors de la conclusion du contrat est considérée comme une preuve de la conclusion du contrat (arrha *confirmatoria*). Dans le droit moderne, les domaines les plus courants où l'on rencontre des arrhes dont l'application a considérablement diminué au fil du temps avec la mise à disposition de méthodes plus fiables par l'ordre juridique sont les ventes de produits agricoles, le commerce d'animaux ou les relations de travail domestique. Le versement des arrhes ne constitue pas une convention distincte du contrat auquel elle se rapporte. Si le contrat pour la conclusion duquel la somme d'argent versée à titre probatoire est non valable, l'accord entre les parties concernant cette exécution ne sera pas valable, et dans ce contexte, la somme versée comme preuve de la conclusion de cet acte juridique sera restituée par principe dans le cadre des dispositions relatives à l'enrichissement illégitime. Selon cette disposition, en règle générale, les arrhes dont la qualité probatoire pour la conclusion du contrat est présumée par le législateur sont imputées sur la créance principale (l'obligation principale de la partie versant). Toutefois, si la disposition contractuelle convenue par les parties ou l'usage locale prévoit que le bénéficiaire les garde, les arrhes ne seront pas imputées. En cas d'existence de la retenue des arrhes, elles ne sont pas imputées sur la créance principale et restituées conformément à l'article 103 du COT sur la base de la relation contractuelle résiliée au moment de l'exécution. Si l'obligation principale du verseur devient impossible en raison d'une circonstance qui lui est imputable les arrhes remise en preuve de la conclusion du contrat devront être imputées par principe sur le montant des dommages-intérêts. Si le contractant met fin au contrat pour lequel les arrhes ont été remises lors de sa conclusion en raison d'une violation du contrat par le verseur, pour le sort des arrhes il sera déterminant qu'il s'agit d'une résolution ou d'une résiliation. Si l'obligation principale du débiteur (verseur) s'éteint à cause de l'impossibilité non imputable au

144 Couchepin (n 28) N 1128. Lorsque le montant de la peine prévue dans la clause vise à couvrir l'intérêt de l'autre contractant à l'exécution il s'agit d'une peine résolutoire. Voir Pellanda Art 160 N 48.

145 Tekinay et Akman et Burcuoğlu et Altop (n 6) 353; Oğuzman et Öz (n 6) N 1612; Kılıçoğlu (n 37) 1004; Yağcıoğlu (n 112) 83. Par exemple, dans un arret la clause du contrat étant rédigée çomme suit: *"...Si l'une des parties se départ injustement et ne respecte pas les dispositions stipulées dans le contrat ou ne remplit pas ses obligations, elle est tenue de payer à l'autre partie, à titre de clause pénale, cinq fois les dépenses documentées encourues par l'entrepreneur pour la construction...."* est considérée par la cour de Cassation turque comme une peine alternative. Voir 6ᵉ Chambre civile de la Cour de Cassation datée du 25.04.2022 dossier no 2022/578 K 2022/2390 (Kazancı). Dans un autre arrêt une clause de même contenu est qualifiée en même temps comme peine résolutoire au sujet du départ du contrat et comme une peine alternative en ce qui concerne la violation de contrat par la Cour de cassation. Voir 15ᵉ Chambre civile de la Cour de cassation datée du 19.02.2018 dossier no: 2016/4690 décision no: 2018/649 (Kazancı).

débiteur selon l'art 136 COT ou l'obstacle à l'exécution est imputée au bénéficiaire les arrhes doivent être restituées au verseur. À moins que les parties au contrat n'attribuent une peine conventionnelle aux arrhes les arrhes ne servent qu'à prouver la conclusion du contrat et cette nature présumée par le législateur exclut par principe l'application du dernier alinéa de l'art. 182 du COT.

Le dédit peut être défini comme une somme de l'argent fournissant au verseur le pouvoir de se départir du contrat sans raison valable (*licentia paenitendi)* Selon l'art. 178 du COT, le dédit est l'argent versé au moment de la conclusion du contrat fournissant aux contractants le pouvoir de se départir du contrat. Le dédit réel ne doit pas nécessairement être remis à l'autre partie du contrat, et il est également possible de le bloquer en faveur du verseur auprès d'un tiers. L'accord concernant le dédit réel doit être conclu conformément à la forme du contrat auquel il se rapporte. Lorsque le dédit réel est remis, les parties obtiennent *facultas alternativa* concernant l'exécution de leurs obligations contractuelles ou la résolution (ou la résiliation) du contrat. Pour les contrats instantanés le droit de mettre fin au rapport contractuel sans motif acquis par voie du versement du dédit réel peut être exercé au plus tard au début de l'exécution de l'obligation principale à moins que les parties n'aient convenu d'un délai spécial. Pour les contrats de durées ce droit peut être exercé en tout temps sous réserve de l'art. 2 du CCT. En cas de résolution ou résiliation du contrat pour lequel le dédit réel est versé, le destinataire de cette déclaration ne peut pas réclamer de dommages-intérêts en raison de résolution ou résiliation franchissant le montant du dédit réel et ne peut pas non plus obliger l'ayant droit à exécuter son obligation en nature à moins que les parties ne se soient réservé ces droits. Lorsque le droit de se départir de contrat du contrat n'est pas exercé il convient d'imputer le dédit réel sur la créance principale par analogie du second alinéa de l'art. 177 du COT à moins que les parties ne conviennent autrement. Étant donné le dédit réel dont la nature se diffère fondamentalement de la peine conventionnelle en fournissant seulement aux parties le pouvoir de se départir du contrat au lieu de rester lié à celui-ci, il n'est pas possible de le déduire aux termes du dernier alinéa de l'art. 182 COT au motif que la somme est excessive même par analogie à moins que les contractants n'attribuent une peine conventionnelle au dédit réel.

En convenant de la peine résolutoire, le débiteur acquiert le droit de mettre fin au contrat sans aucun motif en versant une somme d'argent ou remettant une autre chose. De ce fait, cette peine confère au débiteur *facultas alternativa* concernant l'exécution de leurs obligations contractuelles ou la résolution (ou la résiliation) du contrat. Bien que le dernier alinéa de l'art. 179 du COT ne l'accorde qu'au débiteur, il est possible de fournir ce pouvoir au créancier dans le contrat. Dans un contrat où la peine résolutoire est stipulée le créancier ne peut exiger que l'exécution de l'obligation principale. La réclamation du créacier portant sur l'exécution peut être paralysée par le paiement de

la peine par le débiteur. Si les parties ont convenu d'une peine, c'est le débiteur qui est tenu de prouver qu'il s'agit également d'une peine résolutoire. En d'autres termes, c'est la peine contractuelle qui est la présumée mais pas la peine résolutoire. En revanche, la peine convenue pour le comportement du travailleur contraire à l'interdiction de concurrence dans le contrat de service est présumée comme une peine résolutoire atypique par la loi. À notre avis étant donné la peine résolutoire dont la nature se diffère fondamentalement de la peine conventionnelle en fournissant seulement au débiteur le pouvoir de se départir du contrat au lieu de rester lié à celui-ci, il n'est pas possible de le déduire aux termes du dernier alinéa de l'art. 182 COT au motif que la somme est excessive même par analogie à moins que les contractants n'attribuent une peine conventionnelle a la peine résolutoire.

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RESEARCH ARTICLE

Geschichte und Dogmatik des Rechts bei Puchta und Rudolf von Jhering

Ahmet Arslan *

Zusammenfassung

Die systematische Auffassung des Rechts besteht seit dem römischen Recht und gründet sich grundlegend auf das Naturrecht. Insbesondere bei den Pandektenjuristen unter dem Einfluss *Friedrich Carl von Savignys* erreichte die Systematisierung und Abstraktion des Rechts ihren Höhepunkt. Die Begriffsjurisprudenz ist eine juristische Methodik, die Rechtsbegriffe und -regeln durch Abstraktion und Verallgemeinerung pyramidenartig systematisiert. Ziel ist die Mathematisierung/Geometrisierung des Rechts, um Willkür und Unberechenbarkeit im Recht zu vermeiden. Georg Friedrich Puchta ist wohl der erste Jurist, der mir im Zusammenhang mit der Begriffsjurisprudenz einfällt. Er veranschaulicht seine „*Genealogie der Begriffe*" am Beispiel des Wegeservituts. Auch der junge *Rudolf von Jhering* war ein Anhänger der Begriffsjurisprudenz. Jedoch kritisierte er *Puchtas* Ansichten, nach seinem Umschwung, als lebensfremd, praktisch kaum durchführbar und dem Rechtsempfinden widersprechend. *Jhering* zeigte somit rechtssoziologische Ansätze auf und wandelte er sich methodisch zu einer praktischen, zweckgerichteten Jurisprudenz. Das Endziel des Rechts, nämlich die Umsetzung in die Lebenspraxis, dürfe nicht außer Acht gelassen werden. Der *Zweck* und das *Rechtsgefühl* sollten daher in der juristischen Methodik eine entscheidende Rolle spielen. Mit seinen Ansichten ist er ein Vorläufer der heute vorherrschenden methodischen Interessen- und Wertungsjurisprudenz.

Schlüsselwörter

Begriffsjurisprudenz, Jhering, Interessenjurisprudenz, juristische Methodik, Genealogie der Begriffe

Abstract

Since Roman law, the systematic understanding of the law has been based on natural law. However, the systematization and abstraction of law reached their pinnacle with the Pandectists under the influence of *Friedrich Carl von Savigny*. The jurisprudence of concepts is a legal methodology that systematizes legal concepts and rules in a pyramid through abstraction and generalization. The aim is to mathematically calculate/geometrize the law to prevent it from being arbitrary and unpredictable. This theory is exemplified in the right of way (*Wegeservitut*) by *Puchta*, the first jurist to come to mind regarding the jurisprudence of concepts. *Jhering* criticized *Puchta's* views as unrealistic, impractical, and contrary to the sense of justice, following his turnabout. In this manner, he demonstrated sociological approaches to the law and shifted methodologically toward purpose-oriented, practical jurisprudence. *Jhering* criticized *Puchta's* ideas for being unrealistic, difficult to implement, and devoid of a sense of justice (*Rechtsgefühl*). Jhering demonstrated sociological legal approaches and turned to pragmatic jurists. According to him, the ultimate purpose of the law and its practical application should not be overlooked. Consequently, the purpose of law and a sense of justice should play a determining role in legal methodology. With these ideas, he pioneered the current dominant methodological jurisprudence of interests/values.

Keywords

Jurisprudence of concepts, Rudolf von Jhering, Jurisprudence of interests/values, Legal methodology, Genealogy of concepts

* **Corresponding Author:** Ahmet Arslan (Research Associate), Georg-August-University, Faculty of Law, Chair for Roman Law, Civil Law and Modern Legal History, Göttingen, Germany. E-mail: ahmet.arslan@jura.uni-goettingen.de ORCID: 0000-0003-3695-1572
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Extended Summary

The systematic way of thinking and perceiving law originates mainly in natural law, and the foundations can also be found in Roman law. However, the 19th-century Pandectists reached the pinnacle of systematization and abstraction when they systematically organized the sources in the Roman law fragments.

The legal methodology of *Friedrich Carl von Savigny,* founder of the Historical School of Jurisprudence, is characterized by influences from natural law, i.e., a systematic approach to thinking about law. *Savigny's* methodology is therefore not only historical, but also systematic and philosophical. According to Savigny, legal propositions and rules are formulated through the abstraction and totalization of legal institutions. Savigny paved the way for the jurisprudence of concepts with these approaches (*Begriffsjurisprudenz*).

In the second third of the 19th century, German legal thought was dominated by the jurisprudence of concepts, a logical-systematic understanding and methodology of law. It excluded the law's metaphysical assumptions. General and abstract legal rules and legal concepts are organized in a conceptual pyramid through abstraction. Further, logical deduction can be used to construct more specific legal rules from these legal concepts.

This article aims to explain the significance and systematic position of *Georg Friedrich Puchta's* "Genealogy of Concepts" (*Genealogie der Begriffe*), expose it to *Rudolf von Jhering's* criticism in the comparison of theories, and demonstrate his own analysis of legal formation and legal change.

In pursuit of this aim, the second section examines the significance and structural positioning of *Puchta's Genealogy of Concepts*. Expanding on this foundation, the third section examines *Jhering's* criticism of this methodology as well as his alternative approaches. Consequently, the conclusion summarizes the key findings. Primary sources include *Puchta's Genealogy of Concepts* in Cursus der *Institutionen* 33 and *Jhering's* critique and evolving understanding of law.

This work demonstrates that the jurisprudence of concepts and its critique include many philosophical, sociological, and even economic considerations. *Puchta* developed a legal formalism with the "genealogy of concepts" method, distinguishing between law's systematic and historical aspects. Conceptual jurisprudence limits the function of a judge to the "logical subsumption of the factual situation under legal concepts." If a judge cannot derive a "firm, well-founded conviction" from this system, they can depart from its practical requirements to establish new legal rules.

Jhering criticized *Puchta's* methodology for being formalistic, positivistic,

inapplicable, and insensitive to justice. Since the school of the free law school and the jurisprudence of interest, *Puchta's* entire body of work is to blame for the new methodology's criticism of "the jurisprudence of concepts" With the *Puchta* ancestry, jurisprudence, according to *Jhering*, has become divorced from social facts and political and moral reality. Due to this, the movement against *Puchta* was born from a philosophical point of view and a sociological perspective. *Jhering* criticized *Puchta's* "failed" legal theory for still being remembered in the jurisprudence of concepts.

Many of *Jhering's* criticisms appear to be justified. Several legal institutions/ concepts that were deemed impossible in the jurisprudence of concepts are already in use in modern law.

Jhering vacillated between the two extremes because he found *Puchta's* methodology incompatible with social change. In a sense, *Jhering's* turn signifies that legal thought prioritizes justice over legal formalism. According to him, the law should not be divorced from life's realities. In addition to the law, *Jhering* considered the sense of justice (*Rechtsgefühl*), which has remained pertinent to this day.

Puchta's method does not find many adherents in today's methodology because it focuses only on the subject matter of the law and not on the law as a whole. This is primarily because it does not adequately address the practical end goal of law. However, it cannot be denied that the historical school of jurisprudence has significantly influenced the law.

Since the 1880s, the systematic treatment of Roman legal principles and the dogmatic rigidity of German law has been abandoned, and *Jhering's* concept of "purpose in law" became popular. *Jhering's* return to pragmatic jurisprudence is regarded as the beginning of the jurisprudence of interests. In the jurisprudence of concepts, reason takes precedence, whereas in the jurisprudence of interests, "primacy of life research and life values" take precedence.

A. Einleitung

Die Rechtswissenschaft verdankt ihre systematische Denkweise dem rationalen Naturrecht.[1] Die maßgebenden Grundlagen, die der Systematisierung des deutschen Rechtssystems zugrunde liegen, lassen sich bereits im römischen Recht, insbesondere im *Usus modernus* im weiteren Sinne, finden[2]. Dies ist vor allem auf die Pandektisten des 19. Jahrhunderts zurückzuführen, welche die vielen verschiedenen Rechtsquellen des römischen Rechts neu strukturierten.[3]

Die Rechtsmethode *Friedrich Carl von Savignys,* Mitbegründer der Historischen Rechtsschule, weist bereits Ansätze zur wissenschaftlichen Systematisierung auf.[4] So besteht *Savignys* Methode nicht nur aus einem historischen, sondern auch aus einem systematisch-philosophischen[5] Element, welches den inneren Zusammenhang der Rechtsinstitute herstellt und die Rechtsregeln miteinander verbindet.[6] Laut *Savigny* bilden sich Rechtssätze und Rechtsregeln durch Abstrahierung und *„Totalanschauung"* der Rechtsinstitute.[7]

Eine Vielzahl von Juristen des 19. Jahrhunderts orientierte sich hinsichtlich der aufkommenden Bedeutung einer Systematisierung des Rechts an *Savigny*[8]. Er bereitete auch *Georg Friedrich Puchta* den Weg zur formalen Pandektistik, indem er den Primat der Rechtsinstitute mit einzelnen Rechtsregeln verglich und erklärte, dass ein Rechtsinstitut nur durch formale Logik und abstrakt-begriffliches Denken verstanden werden könne.[9] *Jhering* bezeichnete die formale Pandektistik polemisch als *„Begriffsjurisprudenz"*.[10]

Die Begriffsjurisprudenz ist eine logisch-systematische Rechtsmethode[11], in welcher die aus dem *corpus iuris civilis* gewonnenen Begrifflichkeiten rein formal betrachtet werden. Der Pandektist gewinnt im Wege der Abstrahierung Rechtssätze

1 Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6. neu bearb. Aufl., Berlin: Springer-Verlag 1991) 19.

2 Larenz, (n 1) 19.

3 Larenz, (n 1) 19.

4 Larenz, (n 1) 11; der Systemgedanke kommt aus dem Naturrecht, aber er besteht auch im deutschen Idealismus (Larenz, (n 1) 19).

5 Larenz, (n 1) 11, 19.

6 Larenz, (n 1) 16; laut *Savigny* ist nicht der *„organische"* Zusammenhang der Institute, sondern der logische Zusammenhang der abstrakten/allgemeinen Begriffe systembildend (14).

7 Larenz, (n 1) 14; die Rechtsregeln finden daher ihre Grundlage in den Rechtsinstituten (14).

8 Larenz, (n 1) 19.

9 Okko Behrends, „Jherings Evolutionstheorie des Rechts zwischen Historischer Rechtsschule und Moderne" in Rudolf von Jhering, *Ist die Jurisprudenz eine Wissenschaft? Jherings Wiener Antrittsvorlesung vom 16. Oktober 1868* (Göttingen: Wallstein 1998) 108, 109; Larenz, (n 1) 15.

10 1884 bezeichnete *Jhering* sie – zum ersten Mal in der Rechtsliteratur – als *„Begriffsjurisprudenz"* und *„Begriffshimmel"* (Rudolf von Jhering*, Scherz und Ernst in der Jurisprudenz. Eine Weihnachtsgabe für das juristische Publikum* (1. Aufl., Leipzig: Breitkopf und Härtel 1884) 253, 330); Manfred Fuhrmann, „Jhering als Satiriker – Die „Vertraulichen Briefe über die heutige Jurisprudenz" literarisch betrachtet" in Okko Behrends (Hg), *Jherings Rechtsdenken. Theorie und Pragmatik im Dienste evolutionärer Rechtsethik* (Göttingen: Vandenhoeck und Ruprecht 1996) 26.

11 Thomas Henkel, *Begriffsjurisprudenz und Billigkeit: Zum Rechtsformalismus der Pandektistik nach Puchta* (Dissertation Friedrich-Schiller-Universität Jena 2003) 13, 14.

und -begriffe, welche er gleichsam in einer Begriffspyramide anordnet. Im Wege logischer Schlussfolgerung vermag der Begriffsjurist aus ebendiesen Begriffen weitere spezielle Rechtssätze zu bilden.[12] Die Begriffsjurisprudenz des 19. Jahrhunderts enthält insofern durchaus Reminiszenzen an den *mos geometricus*.[13] Im zweiten Drittel des 19. Jahrhunderts beherrschte diese geradezu algorithmische Form der Rechtsfindung das deutsche Privat-, Straf-, Prozess- und Staatsrechtsdenken und versuchte, gleichsam die Zufälligkeit des Rechts auszuschließen.[14]

Intention dieser Arbeit ist, die Bedeutung und systematische Stellung von *Puchtas „Genealogie der Begriffe"* zu erläutern und sie an *Jhering*s Kritik zu messen sowie dessen eigene Auseinandersetzung mit Rechtsgenese und -wandel aufzuzeigen. Als Primärquellen dienen dabei die von *Puchta* verfasste *„Genealogie der Begriffe" im Cursus der Institutionen § 33* und die Kritiken von *Rudolf von Jhering.*

Hierfür widmet sich das zweite Kapitel (B) der Bedeutung und systematischen Stellung von *Puchtas „Genealogie der Begriffe"*. Ein darauf aufbauendes drittes Kapitel (C) befasst sich mit *Jhering*s Kritik an dieser Methode und dessen eigenen Denkansätzen, bevor das Fazit (D) alle wichtigen Erkenntnisse zusammenfasst.

B. Die Bedeutung und systematische Stellung von Puchtas „Genealogie der Begriffe"

In *§ 33* seinem Werk *Cursus der Institutionen* bringt *Puchta* unter dem Begriff der *„Genealogie der Begriffe"* seine Rechtsmethodik auf den Punkt – das abstrakt-begriffliche Denken.[15] Der Ausdruck „*Genealogie der Begriffe*" steht stellvertretend für das methodische Programm *Puchtas*.[16] Die Juristen *Kantorowicz* und *Wieacker* bezeichnen *Puchta* deshalb als den *„Vater der Begriffsjurisprudenz"*.[17]

Die „*Genealogie der Begriffe*" meint die begriffsorientierte Denkweise *Puchta*s als Ergebnis pandektistischer Rechtssystematisierung, die durch *Savigny* initiiert

12 Henkel, (n 11) 12, 34.

13 Christoph-Eric Mecke, *Begriff und System des Rechts bei Georg Friedrich Puchta* (1. Aufl., Göttingen: Vandenhoeck & Ruprecht 2010) 594; unter dem Begriff *mos geometricus* ist die axiomatisch-deduktive mathematische Methode zu verstehen (Bernd Buldt, „Logik" in Helmuth Schneider und Manfred Landfester (Hg), *Der Neue Pauly*, accessed online on 23 May 2023).

14 Jhering, (n 10) 20, 21, Fn. 35; Mecke, (n 13) 231, 236; Henkel, (n 11) 12, 13, 14; für *Puchta* ist das Recht ein Produkt des Willens und der Freiheit des Einzelnen, das in geschichtlicher Kontinuität entsteht. S Georg Friedrich Puchta, *Cursus der Institutionen I: Einleitung in die Rechtswissenschaft und Geschichte des Rechts bei dem römischen Volk* (Leipzig: Breitkopf und Härtel 4. Aufl 1853, 91 ff; Georg Friedrich Puchta, *Kritik von Georg Beseler`s Volksrecht und Juristenrecht* (Bayern: W. Besser 1844) 19.

15 Henkel, (n 11) 32.

16 Henkel, (n 11) 34.

17 Franz Wieacker*, Privatrechtsgeschichte der Neuzeit: Unter besonderer Berücksichtigung der deutschen Entwicklung* (3. Auflage, Vandenhoeck & Ruprecht 2016) 400; Christoph-Eric Mecke, Puchtas und Jherings Beiträge zur heutigen Theorie der Rechtswissenschaft (Archiv für Rechts- und Sozialphilosophie, 2009, Vol 95, No.4) 541; *Puchtas* Genealogie der Begriffe ist nicht seine eigene Schöpfung, sondern stammt aus *Savigny*s Methodenlehren (Henkel, (n 11) 34); *Puchta* folgte *Savigny* wohl in der Rechtsentstehungslehre (Larenz, (n 1) 20).

wurde.[18] *Puchtas „Genealogie"* lässt sich durch die Begriffspyramide des Logik-Systems beschreiben.[19] Diese basiert auf der Idee eines *„Rechtssystems"*, das universell gültig ist und alle Rechtsbereiche umfasst.[20]

Dabei sei das Recht nur in einem Gesamtsystem sichtbar.[21] Denn innerhalb des Systemgedankens entsteht für *Puchta* trotz der aus der Lebenskomplexität erwachsenden Mannigfaltigkeit von Rechtssätzen, -begriffen und Gesetzeslücken eine Einheit, und damit ein Sinnzusammenhang.[22] Eine Möglichkeit, diese Einheit herzustellen, sind die logisch gebildeten und als *tertium comparationis* einer Vielzahl von Fällen erkannten Begriffe.[23]

Unter systematischer Bearbeitung wird im Recht die Verbindung der oben genannten Mannigfaltigkeit mit der Entwicklung der Begriffe verstanden.[24] *Puchta* bezeichnete die einzelnen Begriffe unabhängig von Rechtssätzen und ihren *„Erzeugern"* als *„lebendige Wesen"* und *„Individualität"*.[25]

Der organische Zusammenhang der Rechtssätze verwandelt sich in den organischen Zusammenhang der Begriffe.[26] Durch den systematischen und historischen Zusammenhang, der dem Geist des Volkes entstammt, ermöglichen die Rechtssätze die Schaffung der *„Genealogie der Begriffe"*.[27] Nach *Puchta* bilden daher die einzelnen Rechtssätze das Recht.[28]

18 Larenz, (n 1) 19; Behrends, (n 9) 109; für ausführliche Informationen zum Konzept des Rechtssystems s. Larenz, (n 1) 19; *Puchtas* Bemühen um Systematisierung steht im Einklang mit der Vorstellung der historischen Rechtsschule, die das Recht im objektiven Sinne als eine Wissenschaft betrachtet.

19 Puchta, (n 14) 36, 101; Larenz, (n 1) 21; Henkel, (n 11) 33; Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung Bd. 3: Mitteleuropäischer Rechtskreis* (Tübingen: Mohr 1976) 89; *Puchta* verwendete selbst den Ausdruck *„Begriffspyramide"* nie. Daher gibt es auch die Meinung, dass statt *„Begriffspyramide"* der bessere Ausdruck im *Kant*ischen Sinne *„Stammbaum"* sei; *„Im Gegensatz zu organischem System gleicht das begriffliche System nach den Regeln der formalen Logik in etwa einer Pyramide"* (Larenz, (n 1) 20); *„Das Recht [ist] selbst ein System […]"* (Mecke, (n 13) 588).

20 Behrends, (n 9) 110; nur *„die systematische Kenntniß des Rechts ist eine vollständige. Vor allem äußerlich, indem sie allein die Sicherheit gewährt, alle Theile des Rechts zu umfassen." […]*Ansonsten *„wären wir nie gewiß, den ganzen Umfang desselben uns zu eigen gemacht zu haben […]"* (Puchta, (n 14) 36, 100 ff.); Mecke, (n 13) 617.

21 Larenz, (n 1) 12.

22 Vgl Larenz, (n 1) 12, 19; *Puchta* selbst sprach von der *„Mannigfaltigkeit der Menschen und Dinge"* (Puchta, (n 14) 101). Er denkt, dass der oberste Grundsatz eine Voraussetzung für das System ist. Dieser Grundsatz lautet: *„jedes Recht ist eine Beziehung des Willens auf einen Gegenstand"*, daher gibt es in verschiedenen Gegenständen unterschiedliche Rechte (Hans-Peter Haferkamp, *Georg Friedrich Puchta und die „Begriffsjurisprudenz"* (Frankfurt am Main: Vittorio Klostermann 2004) 81).

23 Larenz, (n 1) 20; bei jedem Begriff soll *„seine Stellung"* im System *„zum Bewußtseyn kommen"*, ohne *„die Classen noch ganz anders durch einander zu würfeln"* (Puchta, (n 14) 101).

24 Larenz, (n 1) 12.

25 Puchta, (n 14) 101; Henkel, (n 11) 25; damit ist gemeint, dass es sich bei der Genealogie der Begriffe nicht um ein bloßes „Schema von Definitionen" handelt. Vielmehr dienen diese Individualitäten – unabhängig von ihren Schöpfern wie Juristen oder Gesetzgebern – der Weiterentwicklung des Rechts (vgl. Puchta, (n 14) 101 ff).

26 Larenz, (n 1) 21; *„die Zurückführung der Rechtssätze auf ihre Ratio"* (Henkel, (n 11) 36).

27 Mecke, (n 13) 766.

28 Puchta, (n 14) 12, 53; Mecke, (n 13) 763; im Unterschied zu *Savigny* betonte er nicht den Zusammenhang der Rechtsinstitute, sondern den organischen Zusammenhang der Rechtssätze (Henkel, (n 11) 26; Larenz, (n 1) 21).

Sowohl *Puchta* als auch der junge *Jhering* wollten den Wissenschaftsanspruch der Jurisprudenz trotz der Kritik an einem geschlossenen und ableitbaren System erhalten.[29] Um die Rechtswissenschaft zu legitimieren, hatte *Puchta* einen auf dem rezipierten *corpus iuris civilis* als *ratio scripta* beruhenden Ansatz entwickelt.[30] Der Rationalismus des 18. Jahrhunderts hatte einen großen Einfluss auf die Entwicklung weiterer Begriffe *Puchta*s in seinem System der logisch-deduktiven Methoden.[31]

Dieses ideale System ist darauf gegründet, dass sich Begriffe unter den an der Spitze stehenden allgemeinsten Begriff subsumieren lassen.[32] Insofern prägte *Puchta* eine formale Jurisprudenz und betrachtete die Rechtswissenschaft als ein logisches System, welches durch eine Begriffspyramide systematisiert wird.[33] Die Begriffe ergeben sich aus verschiedenen Abstraktionsebenen, die vertikal und horizontal verknüpft werden können.[34]

Puchta erklärt diese Methode am bereits genannten Beispiel des Wegeservituts: *„Es ist ein Recht, also eine Macht über einen Gegenstand; ein Recht an einer Sache, also der besonderen Natur dieser Rechte Theilhaftig (sic!); ein Recht an einer fremden Sache, also eine partielle Unterwerfung derselben, die Seite von welcher der Rechte an Sachen auf Benutzung; die Benutzung ist für ein gewisses Objekt bestimmt, über das sie nicht hinausgeht, also ist das Recht eine Servitut; für ein Grundstück, also Prädialservitut; für dieses Bedürfniß eines Grundstücks, Wegservitut“*.[35]

Ohne die *„Genealogie der Begriffe“* wäre das Recht „*ein bloßes Aggregat von Rechtssätze[n]“*.[36] Dementsprechend ist der Zweck dieser *Genealogie*, die schwer fassbare und systematisierbare Inhaltsmasse des *corpus iuris civilis* auf abstrahierende Weise in ein kohärentes System umzuschreiben, um es verständlicher zu machen und die Beherrschung zu erleichtern.[37] *„Wie ist es möglich, dass die Richter unter der Kontrolle der Rechtswissenschaft das Recht fortbilden können?“*[38] Entsprechend

29 Mecke, (n 13) 46; aber natürlich gibt es Unterschiede zwischen den Methoden der beiden. S. dazu Mecke, (n 13) 46.

30 Mecke, (n 17) 544; im System *Savigny*s haben die Logik und das organische Element – aufgrund des Bedenkens, das die Alleinherrschaft der Logik hervorrufen kann – das gleiche Gewicht. Im Unterschied dazu spielt die Logik entscheidende Rolle im System *Puchta*s. Während *Savigny* die Beziehung mit hinter Rechtsregeln stehenden Institutionen hervorhebt, akzeptierte *Puchta* stattdessen abstrakte Begriffsbildung (Larenz, (n 1) 24).

31 Larenz, (n 1) 22; Wieacker, (n 17) 373 ff.; insbesondere *Christian Wolf*; die idealistische Philosophie spielt eine gewisse Rolle bei der Bestimmung des Inhalts von Begriffen (Mecke, (n 13) 617).

32 Manfred Wolf, *Philipp Heck als Zivilrechtsdogmatiker: Studien zur dogmatischen Umsetzung seiner Methodenlehre* (1996) 151 ff; Larenz, (n 1) 20.

33 Larenz, (n 1) 20; *„Das Recht ist ein vernünftiges, und dies ist die Seite von welcher es ein System ist, einen Organismus von Gattungen und Arten bildet. Aber dieß ist nur eine Seite des Rechts, von welcher ausgehend wir nie zu der andern, der Freiheit, gelangen würden; in dieser letzten liegt der Keim des Rechts“* (Puchta, (n 14) 6).

34 Henkel, (n 11) 34; für das konkrete Erklärung am Beispiel des Wegeservitutes: s unten 7, 8.

35 Puchta, (n 14) 101; Larenz, (n 1) 21; Henkel, (n 11) 37.

36 Mecke, (n 13) 766.

37 Vgl Hans-Peter Haferkamp, „Die sogenannte Begriffsjurisprudenz im 19. Jahrhundert – „reines“ Recht“ in Otto Depenheuer (Hg), *Reinheit des Rechts* (2010) 84; Henkel, (n 11) 13.

38 Haferkamp, (n 37) 95.

dieser Aussage ist *Puchtas* weiteres Ziel, ein System zu bilden, welches den Richter mit methodischem Handwerkzeug ausstattet. Dieses Handwerkzeug sind besagte Rechtsbegriffe und -prinzipien, die als dritte Rechtsquelle *(Juristenrecht)* neben Gesetzesrecht und Gewohnheitsrecht die Weiterbildung der Rechtssätze ermöglichen.[39]

Somit erleichtere die *Genealogie der Begriffe* den Entscheidungsprozess des Richters, da sogar die *„besten"* Gesetze nicht für jeden konkreten Fall eine bestimmte Norm aufwiesen.[40] Die von Juristen aus dem Systemzusammenhang abstrahierten Rechtssätze dienten somit der Lückenfüllung des Rechts.[41] Dies bedeutet nach *Larenz*, dass die von *Puchta* geschaffene Begriffspyramide als Quelle auch zur Erzeugung von Rechtssätzen diene.[42] Zugleich ermögliche diese Genealogie durch daraus abzuleitende Rechtssätze neue Lösungen für neue Probleme des Lebens.

Puchta selbst sprach von der *Genealogie der Begriffe* als *„Hierarchie der Begriffe, [die] von den Axiomen aus abwärts lückenlos hergestellt und die Deduktion der einzelnen Rechtssätze und Entscheidungen erst in Strenge möglich [macht]"*[43]. Der Hauptantrieb bei der Spezifikation und kontinuierlichen Weiterentwicklung von Begriffen und Rechtsinstituten in der Begriffspyramide nach unten sei die *„Mannigfaltigkeit der Menschen und Dinge"*.[44] Parallel dazu meinte *Puchta*, dass *„(sich das) Recht [...] von ursprünglicher Einfachheit zu größerer Mannigfaltigkeit"* hin verändere.[45]

Nach *Puchta* sei das Recht eine geschichtlich bedingte Tatsache[46] und die Grundlage des Rechts die menschliche Freiheit.[47] Er versteht das positive Recht dabei anhand von dessen historischen Wurzeln.[48] Die Genealogie beziehe ihre Quelle sowohl aus der inneren, systematischen Mannigfaltigkeit der Rechte als auch aus der Geschichte. In diesem Sinne sei die Genealogie sowohl ein Ausdruck des Systems als auch der Geschichte. Die gemeinsame Quelle sei der *„Volksgeist"*.[49]

Der sicherste Weg zum Schutz der Hauptquelle *„Volksgeist"* sei laut *Puchta* die *Genealogie der Begriffe*, da er als ein organisches System lebendig sei und sich immer

39 Haferkamp, (n 37) 95; Larenz, (n 1) 21; Henkel, (n 11) 36.

40 Sogar das 1794 erlassene und aus mehr als 19.000 Vorschriften bestandene ALR (*Allgemeines Landrecht für die Preußischen Staaten*) weist nicht für jeden konkreten Fall eine bestimmte Norm auf.

41 Haferkamp, (n 37) 88.

42 Larenz, (n 1) 55.

43 Wieacker, (n 17) 400.

44 Puchta, (n 14) 101; Mecke, (n 13) 631, 632.

45 Puchta, (n 14) 45.

46 Puchta, (n 14) 96.

47 Puchta, (n 14) 97.

48 Haferkamp, (n 37) 88.

49 Mecke, (n 13) 627; es wird auch gesagt, dass die Methode *Puchta*s, die die Rechtssätze rationalisiert, auf der Philosophie *Schellings* basiert (Haferkamp, (n 37) 88).

weiter entwickele.[50] Diese im Volksgeist verborgenen Rechtssätze werden durch Schlussfolgerung im Wege der Deduktion sichtbar.[51] Sowohl bei *Puchta* als auch dem jungen *Jhering* beschrieb *„Deduktion"* eine einfache argumentative Begründung.[52]

Puchtas System ist kein statisches, das nur einen vorhandenen Organismus überträgt, sondern ein aktives.[53] Demzufolge werden der *Genealogie der Rechtsbegriffe* zwei Verwendungsweisen zugeschrieben: eine Ordnende und eine Produktive.[54] Dies bedeutet, dass dieses System einerseits eine didaktische Ordnung, nämlich die *„äußerlich systematische Kenntniß des Rechts"*[55], und andererseits unabhängige Erkenntniswerte bietet, nämlich die *„Erkenntniß des innern Zusammenhangs"*[56]. In diesem Sinne spiele laut *Puchta* die Weiterentwicklung des Rechts – das organische Merkmal des Rechts – eine große Rolle.[57]

Dass ein Rechtsinstitut sowohl systematisch als auch historisch (i. e. genealogisch) bedingt sei, erläutert *Puchta* am Beispiel des *„Wegeservituts"*. Da das *„Wegeservitut"* nicht als Apriori gesetzt werden kann, entwickelte es sich auch in der Gesellschaft als historisch *„freie Seite des Rechts"*. Wenn das *„Wegeservitut"* ein Institut wäre, das als Apriori abgeleitet werden könnte, bestünde es in der gleichen Form überall auf der ganzen Welt. Dass dieses Konzept nicht in Widerspruch zu anderen Konzepten in der Pyramide stehe, wie z. B. dem *„Recht an einer Sache"*, sei Ausdruck systematischer Einheit dieses Konzepts.[58]

Die Genealogie nach *Puchta* ermöglicht eine systematische Ausdifferenzierung von Rechtsbegriffen[59]. Es ist jedoch zweifelhaft, wie die weiteren Rechtssätze daraus abgeleitet werden können. Die *Genealogie der Begriffe* besagt, dass jeder höhere Begriff bestimmte Aussagen zulässt und dass der höchste Begriff durch seinen Inhalt alle niedrigeren Begriffe, die von ihm abgeleitet werden können, einschließt.[60] Nur Rechte, die sich aus diesen Grundbegriffen ableiten lassen, werden als solche anerkannt.[61]

50 Mecke, (n 13) 630.

51 Puchta, (n 14) 22; für detaillierte Informationen für Rechtssätze, s. Mecke, (n 13) 546, 763 ff.; Larenz, (n 1) 21.

52 Mecke, (n 17) 546.

53 Haferkamp, (n 37) 80; somit wich *Puchta* von *Savignys* Methode ab; im Unterschied zu *Savigny* befindet sich bei der *Puchtas* Methodenlehre nicht nur Systembildung, sondern auch ein Systembau (Haferkamp, (n 37) 81).

54 Henkel, (n 11) 34.

55 Puchta, (n 14) 100.

56 Henkel, (n 11) 34; *„seine Natur vollkommen" erfassende „Die systematische Erkenntniß ist die Erkenntniß des innern Zusammenhangs, welcher die Theile des Rechts verbindet. Sie fasst das Einzelne als Glied des Ganzen auf, das Ganze als einen in besondere Organe sich entfallenden Körper."* (Puchta, (n 14) 100).

57 Mecke, (n 13) 637.

58 Mecke, (n 13) 633, 634.

59 Es ist fraglich, ob *Puchta „Rechtsbegriffe"* und *„Principien"* als Synonyme verwendete (s. dazu Henkel, (n 11) 40).

60 Larenz, (n 1) 22.

61 Larenz, (n 1) 22.

In diesem System entstammt der höchste Begriff, von dem andere Begriffe abgeleitet werden, nicht dem positiven Recht, sondern der Rechtsphilosophie.[62] *Puchta* geht in seiner Systematisierung von einem festen Ausgangspunkt aus, den er als *höchsten Begriff* bezeichnet.[63] Die anderen Begriffe können durch das Verfolgen der *Genealogie der Begriffe* auf- und abwärts, also induktiv und deduktiv, abgeleitet werden.[64] Die philosophische Wirkung des Ausgangsbegriffs nimmt allmählich ab.[65]

Im *Cursus der Institutionen* wird die Rechtswissenschaft als Rechtsquelle ausschließlich als Domäne der Juristen angesehen.[66] Die Aufgabe der Rechtswissenschaft in der Methodik *Puchtas* ist, das *„durch den unmittelbaren Willen der Nation oder den Gesetzgeber"* entstehende Recht als System anzuerkennen und zu erfassen, um somit die vernünftige Seite des Rechts auszubilden.[67] Die Juristen üben diese Aufgabe als ein Teil des Volksgeistes aus. Diese Aufgabe führen die Juristen dadurch aus, dass sie sich des Zusammenhangs der Rechtssätze bemächtigen und *„ihre Verwandtschaft untereinander erforscht [haben], so dass [sie] die Abstammung eines jeden Begriffs durch alle Mitglieder, die an seiner Bindung Antheil haben, auf und abwärts"* nachvollziehen können.[68] Dies hängt von der Professionalität der Juristen ab[69] und zeigt, dass die Strukturierung und die rationalen Zusammenhänge des Rechts vom Juristenrecht (Rechtswissenschaft) gemacht werden, nicht aus sich selbst.[70] Indem die Juristen aus auf diese Weise gefundenen *„Prinzipien"* neue Rechtssätze konstruieren, wirken sie rechtsfortbildend.[71]

62 Larenz, (n 1) 22; *„Der Inhalt dieses höchsten Begriffs darf nicht aus ihm abgeleiteten Begriffen entstammen, sonst wäre das Ganze ein Zirkelschluss"* (22).

63 Larenz, (n 1) 22.

64 Henkel, (n 11) 38.

65 Larenz, (n 1) 22.

66 Puchta, (n 14) 36; Larenz, (n 1) 21; Henkel, (n 11) 33.

67 *„Es ist nun die Aufgabe der Wissenschaft, die Rechtssätze in ihrem systematischen Zusammenhang, als einander bedingende und voneinander abstammende zu erkennen, um die Genealogie der einzelnen bis zu ihrem Prinzip hinauf verfolgen, und ebenso von den Principien bis zu ihren äußersten Sprossen herabsteigen zu können. Bei diesem Geschäft werden Rechtssätze zum Bewußtsein gebracht und zu Tage gefördert werden, die in dem Geist des nationalen Rechts verborgen … erst als Produkt einer wissenschaftlichen Deduction sichtbar entstehen. So tritt die Wissenschaft als dritte Rechtsquelle zu den ersten beiden; das Recht, welches durch sie entsteht, ist Recht der Wissenschaft, […] oder Juristenrecht"* (Puchta, (n 14) 22, 36 ff.)*;* Haferkamp, (n 37) 79.

68 *„Die Abstammung eines jeden Begriffs durch alle Mitglieder, die an seiner Bildung Anteil haben, auf- und abwärts zu verfolgen, die Herkunft eines jeden Rechts bis hinauf zum Begriff des Rechts schlechthin sich zum Bewußtsein bringen und von diesem obersten Rechtsbegriff wieder hinab zu jedem einzelnen Rechte gelangen können vermag"* (Puchta, (n 14) 13, 101).

69 Henkel, (n 11) 37.

70 Haferkamp, (n 37) 80.

71 Haferkamp, (n 37) 80.

C. Jherings kritische Haltung gegenüber Puchta

I. Jherings Kritik an Puchtas Begriffsjurisprudenz

Puchta und sein 20 Jahre jüngerer Schüler *Jhering* waren angesehene Vertreter der Historischen Schule.[72] *Jhering* war in seiner frühen Zeit ebenfalls Begriffsjurist. *Jhering* bezeichnete sich selbst sogar als *„Fanatiker der logischen Methode"* und betrachtete *Puchta* als Vorbild.[73]

Das ständige Auftauchen neuer Rechtsfragen in der sich durch industrielle und französische Revolution sozioökonomisch stets wandelnden Gesellschaft förderte die Anpassungsunfähigkeit der Begriffsjurisprudenz zutage.[74] Da das römische Recht freiheitlich war und auf der Willensfreiheit beruhte, harmonierte es zunächst bis zu einem gewissen Grad mit der Industriegesellschaft und dem im Vordringen befindlichen Liberalismus.[75] Die Begriffsjurisprudenz konnte jedoch nicht immer befriedigende Antworten auf die im Alltag immer wieder in verschiedener Form auftretenden Konflikte geben.[76] Erst gegen Ende des 19. Jahrhunderts setzte sich allgemein die Auffassung durch, dass die formale Pandektistik nicht mehr ausreiche, um die soziale Aufgabe des Rechts zu erfüllen.[77]

72 Christoph-Eric Mecke, *Begriff des Rechts und Methode der Rechtswissenschaft bei Rudolf von Jhering* (Göttingen: Vandenhoeck & Ruprecht 1. Aufl 2018) 13.

73 Jhering, (n 10) 338 ff.; *„[ein dem] Andenken des großen Meisters, Georg Friedrich Puchta", gewidmetes geschichtsphilosophisches Werk über den Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung"* (Behrends, (n 9) 108, Fn. 7); *„Es gab eine Zeit, wo Puchta mir als Meister und Vorbild der richtigen juristischen Methode galt, und wo ich so tief in derselben befangen war, daß ich das Vorbild hätte überbieten können. [...] Kurz, es kann kaum jemand ein solcher Fanatiker der logischen Methode gewesen sein, als ich zu jener Zeit. [...] Aber dann kam bei mir der Umschwung […]. Im vierten Bande meines Geistes des römischen Rechts (1865) habe ich dann zuerst gegen den Kultus des Logischen', und die ‚Schuldialektik' öffentlich die Lanze eingelegt [...]. Die Erkenntnis (..) hat mich bestimmt, das obige Werk vorläufig zur Seite zu legen und mein Werk über den, Zweck im Recht' in Angriff zu nehmen"* (Jhering, (n 10) 338 ff); *„herrschende Savigny-Puchta'schen Theorie von der Entstehung des Rechts […], mit der ich selber seiner Zeit die Universität verlassen, und unter deren Einfluss ich noch viele Jahre gestanden habe."* (Rudolf von Jhering, *Der Kampf ums Recht* (Propyläen Verlag 1997) 12 ff.).

74 Larenz, (n 1) 44.

75 Larenz, (n 1) 44.

76 Larenz, (n 1) 44.

77 Larenz, (n 1) 44.

Jhering durchlebte 1859[78] eine (streitige[79]) rechtswissenschaftliche Krise.[80] Früher als andere Juristen wurde er der Unzulänglichkeit der Pandektistik gewahr und schloss, dass eine solche Privatrechtskonzeption die sogenannte *soziale Aufgabe* nicht erfülle.[81] Verfehlt sei vornehmlich die Organisation römischer Rechtsbegriffe und damit der Rechtssätze nach ihrer Pyramidenstufe, nicht aber nach ihrem Zweck und ihrer Funktion.[82] Die Ursache für die Spannung zwischen Theorie und Praxis sei die rein theoretische, für die Praxis oftmals kaum taugliche Sichtweise auf vergangenes Recht.[83]

Jhering zufolge waren die römischen Rechtsbegriffe mitnichten über jeden Zweifel erhaben und alle Rechtssätze aus der Kombination derselben ableitbar.[84] Nach *Jhering* war *Puchta* hauptverantwortlich dafür, dass *Jhering* sich selbst in seiner Frühzeit geirrt hatte.[85] *Jhering* bezeichnete *Puchta*s Methode späterhin als *„Verirrung"*.[86]

Insbesondere in der etwa 40 Jahre nach Puchtas Tod verfassten Arbeit *„Scherz und Ernst in der Jurisprudenz"* von 1884[87] kritisierter *Puchta*s Methode satirisch als *„Begriffsjurisprudenz"* und *„Begriffspyramide"*,[88] zwei Begriffe, die noch heute eher negativ konnotiert sind[89]. Denn er sah, dass das bisherige Rechtsverständnis in

78 Inge Kroppenberg, *Die Plastik des Rechts – Sammlung und System bei Rudolf v. Jhering* (Berlin: Duncker und Humblot 2015) 22; auch vor seinem Umschwung kritisierte *Jhering* die Begriffsjurisprudenz (Mecke, (n 72) 19, Fn. 38).

79 Es ist umstritten, ob es sich bei *Jhering* um einen drastischen Meinungsumschwung im Jahre 1859 (*Damaskuserlebnis*) oder um einen sich über Jahre hinziehenden Wandlungsprozess handelt. Insbesondere *Wieacker, Haferkamp* und *Falk* argumentieren für einen radikalen Wandel im Jahr 1859, während *Ralf Seinecke, Michael Kunze* u.a. die gegenteilige Auffassung vertreten (s Ralf Seinecke, „Rudolf von Jhering anno 1858: Interpretation, Konstruktion und Recht der sog. „Begriffsjurisprudenz"" in ZRG Germ. Abt. 130 (2013) 279, 280; Kunze, M, *„Lieber in Gießen als irgendwo anders..."Rudolf von Jherings Gießener Jahre* (Kartoniert, Nomos 2018); Haferkamp, (n 37) 81).

80 Okko Behrends, „Das „Rechtsgefühl" in der historisch-kritischen Rechtstheorie des späten Jhering. Ein Versuch zur Interpretation und Einordnung von Jherings zweitem Vortrag" in Rudolf von Jhering, *Ueber die Entstehung des Rechtsgefühles* (Napoli: Jovene Editore 1986) 124, 246; Ralf Dreier, „Jherings Rechtstheorie – eine Theorie evolutionärer Rechtsvernunft" in Okko Behrends (Hg), *Jherings Rechtsdenken. Theorie und Pragmatik im Dienste evolutionärer Rechtsethik* (Göttingen: Vandenhoeck und Ruprecht 1996) 222; Mecke, (n 72) 13; die Abschiedsvorlesung von 1872 in Wien wird auch als dritte wissenschaftliche Wende aufgezeigt. Nach diesem Ereignis wurden die Ideen *Jhering*s noch radikaler.

81 Larenz, (n 1) 44.

82 *Jhering* meinte, dass *„die einzelnen Rechtssätze [...] nicht nach ihrem besonderen Zweck und nach ihrer Funktion im Sinnzusammenhang des betreffenden Rechtsinstitutes oder einer umfassenderen Regelung, sondern allein danach beurteilt hat, auf welcher Stufe der Begriffspyramide sie einzuordnen sind."* (Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung Bd. 3 Erste Abtheilung* (1. Aufl., Leipzig: Breitkopf und Härtel 1865) 300; Mecke, (n 13) 807; Larenz, (n 1) 22; damit lehnte *Puchta* die zweckgemäße Auslegung und auf Sinnzusammenhang der Rechtsinstitute beruhende Auslegung ab (Larenz, (n 1) 24).

83 Ralf Seinecke, „Methode und Zivilrecht beim „Begriffsjuristen" Jhering" in Joachim Rückert und Ralf Seinecke (Hg), *Methodik des Zivilrechts von Savigny bis Teubner* (Baden-Baden: Nomos 2012) 128, 135.

84 Larenz, (n 1) 45.

85 Seinecke, (n 79) 239; Mecke, (n 13) 19; Jhering, (n 10) 347; *„erste, der sich meldete" und auch ohne Probleme sofort Aufnahme fand, erst „nach ihm steigerte sich der Zugang [...]" und damit die Zahl der Begriffsjuristen"* (Jhering, (n 10) 245, 253, 330); *"Man muss erst den Glauben an die Theorie vollständig verloren haben, um ohne Gefahr sich ihrer Bedienen zu können"* (Jhering, (n 10) 54, 75).

86 Jhering, (n 10) 338 ff, 347.

87 Dieses Werk *Puchta*s sin aus den *„Vertraulichen Briefen"* hervorgegangen (Dreier, (n 80) 223).

88 S dazu Behrends, (n 10) 17 ff. *(Jhering als Satiriker).*

89 Mecke, (n 17) 540.

vielen praktischen Fällen nicht angewendet werden konnte.[90] *Jhering* wiederholte seine Kritik an der Begriffsjurisprudenz in seiner Arbeit Besitzwille (*„Kritik der herrschenden Methode“* von 1889 und schuf ein *„Sündenregister“* mit sechs Aspekten.[91]

Somit kritisierte *Jhering* auch eigene frühe Rechtsideen, die sich seit etwa den 1860er Jahren stark wandelten.[92] Die Methoden *Puchta*s – und dem jungen *Jhering* – werden seit dessen Kritik an der Begriffsjurisprudenz als *„verfehlte“* Rechtsvorstellungen angesehen.[93] In diesem Sinne ist *Jhering* derjenige, der einerseits die Begriffsjurisprudenz auf die Spitze trieb und andererseits nach einiger Zeit die eigenen frühen Vorstellungen satirisch und fast schon polemisch kritisierte[94].

Jhering kritisierte nicht das Verstehen des Rechts durch Begriffe, sondern deren missbräuchliche Verwendung.[95] Er leugnet die Wichtigkeit der Bildung juristischer Begriffe nicht. Im Gegenteil meinte er: *„Jede Jurisprudenz operiert mit Begriffen, juristisches und begriffliches Denken ist gleichbedeutend, in diesem Sinne ist also jede Jurisprudenz Begriffsjurisprudenz, die römische in erster Linie; eben darum braucht der Zusatz nicht erst hinzugefügt zu werden. Wenn dies hier meinerseits gleichwohl geschieht, so ist damit jene Verirrung unserer heutigen Jurisprudenz gemeint, welche den praktischen Endzweck und die Bedingung der Anwendbarkeit des Rechts außer Acht lassend, in demselben nur einen Gegenstand erblickt, an dem das sich selber überlassene, seinen Reiz und Zweck in sich selber tragende logische Denken sich erproben kann, – eine Arena für logische Evolutionen, für die Gymnastik*

90 *„Gerade das aber ist es, was ich der Begriffsjurisprudenz zum Vorwurf mache, daß sie fährt, ohne sich darum zu kümmern, ob sie, wenn sie nach langer Fahr endlich anlangt, wirkliche Güter, d.h. solche, welche für das Leben einen Wert haben, auszuladen vermag. In strengster Befolgung der Begriffe gelangt sie zu so überaus fein zugespitzten Unterschieden, daß dieselben in der Hand des Praktikers, der mit ihnen operieren soll, zerbrechen …“* (Jhering, (n 10) 345); *„Lehrer [hat] diesmal seinen Meister gefunden […], nämlich den Meister in der Begriffsjurisprudenz“* Jhering, (n 10) 330; Larenz, (n 1) 45; Mecke, (n 13) 18, 19; Behrends (n 80) 26.

91 Rudolf von Jhering, *Der Besitzwille: zugleich eine Kritik der herrschenden juristischen Methode* (Jena: Gustav Fischer 1889) 537: *„1. Uebersehen der entgegenstehenden Zeugnisse der Quellen; 2. Kritiklose Entgegennahme der rein doktrinären Abstraktionen der römischen Juristen; 3. Gänzliche Vernachlässigung der geschichtlichen Seite der Frage; 4. Vollendetes Schweigen in Bezug auf die Beweisfrage; 5. Völlige Mißachtung der legislativ-politischen Seite der Frage, nicht der leiseste Ansatz zu einer praktischen Kritik der angeblichen Gestalt der Sache im römischen Recht; 6. Gewaltsamste Durchführung des aufgestellten rein formalistischen Gesichtspunktes – Mißhandlung der Sprache und des gemeinen Denkens fehlerhafte Schlüsse eine Opportunitätslogik, die mit sich selber in Widerspruch geräth – kurz Inkorrektheit selbst in Bezug auf den einzigen Punkt, in welchem sie völlig unanfechtbar dastehen müßte: der Logik“;* der Begriff *„Sündenregister“* ist ein Ausdruck für das *Jhering*s gewandelte Rechtsdenken (Mecke, (n 72) 19).

92 Larenz, (n 1) 45; Seinecke, (n 83) 148; Mecke, (n 13) 18, 19; *Jhering*s neue Ideen sind 1864 in der 4. Bande des „Geiste des römischen Rechts“ erschienen; *„Die Geschichte in Ehren […]“, aber gerade „in unserem Jahrhundert unter dem Einfluß der historischen Richtung […] ist der Riß zwischen Theorie und Praxis ungleich größer geworden als er früher war, und die Folge davon ist, daß auch der Einfluß der Theorie auf die Praxis sich verringert hat.“*

93 Haferkamp, (n 22) 1 ff.; Mecke, (n 13) 27; Mecke, (n 17) 540; Mario Losano, „Tobias Barreto und die Rezeption Jherings in Brasilien“ in Okko Behrends (Hg), *Jherings Rechtsdenken. Theorie und Pragmatik im Dienste evolutionärer Rechtsethik* (Göttingen: Vandenhoeck und Ruprecht 1996) 77 Fn. 25.

94 Henkel, (n 11) 16, 27; für Kritik *Heck*s am begriffsjuristischen System s. Wolf, (n 32) 155.

95 Nach seiner methodenkritischen Wende sagte *Jhering „Je länger je mehr [sei] klar geworden […], daß über der juristischen Konsequenz und dem bloß Formalen der juristischen Logik […] als Höheres und Höchstes die substantielle Idee der Gerechtigkeit und Sittlichkeit“* stehe; Henkel, (n 11) 16; Jhering, (n 10) 363.

des Geistes, in der dem grüßten Denkvirtuosen die Palme zufällt".[96]

Diesem Zitat entsprechend vertritt *Puchta* die Methode der Rechtsfindung, die lebensfremd erscheint und durch einen einseitig formalen Charakter *„an Buchstaben haftet" (sic!)*.[97] *Jhering* bezeichnete *Puchta*, *„als typische[n] Vertreter der einseitigsten, verstiegenen, welt- und lebensfremden, praktisch unanwendbaren, dialektisch haarspaltenden Begriffsjurisprudenz"*.[98] Er kritisiert, dass die Begriffsjurisprudenz als *„Kultus des Logischen"* nicht dem *„praktischen Endzweck"* des Rechts dient, sondern dieses missbraucht und vom Zweck des Rechts, den Tatsachen des Lebens und von der Anwendbarkeit entfernt erscheint.[99] Nach *Jhering* sollten die Rechtsbegriffe psychologisch, praktisch, ethisch sowie historisch ausgefüllt und sodann angewendet werden.[100]

Jhering hielt es zudem für einen Irrglauben der Begriffsjurisprudenz, die römischen Rechtsbegriffe seien unveränderlich.[101] Ihr Bedeutungsgehalt ist nicht gleichsam in Stein gemeißelt, er kann sich ändern. So erachteten die Pandektisten die unmittelbare Stellvertretung, die Forderungszession, Pfandrecht an eigner Sache sowie die Möglichkeit, das Erbe teils instestat, teils testamentarisch zu vererben als aus der Begriffspyramide nicht ableitbare und damit abzulehnende Rechtsinstitute.[102]

Nach *Jhering* lassen Juristen tatsächliche Wahrheiten außer Acht, während römische Juristen sich in dem Maße mit Begriffsjurisprudenz befassten, wie es die praktischen Bedürfnisse erforderten.[103] Verlieren die Rechtsbegriffe durch Missachtung des Zwecks ihrer Rechtssätze die Verbindung zum Leben, bedeutet dies, dass die Rechtslogik nicht mehr für das Leben gilt.[104]

96 Jhering, (n 10) 347.

97 *„das Endziel der Jurisprudenz und damit aller theoretisch-dogmatischen Untersuchungen [ist] ein praktisches […]"* (Jhering, (n 10) 9); Henkel, (n 11) 14; aus ähnlichen Gründen kritisierte *Kirchmann* die Begriffsjurisprudenz, und dadurch *Puchta* und den jungen *Jhering*, dass die Rechtstheorie für die Praxis nicht nützlich sei und, dass anstatt sich mit Rechtsfortbildung zu befassen, *„die Bildung der Gegenwart in der wohlbekannten Kategorie erstorbener Gestalten zu bezwängen"* (Larenz, (n 1) 43). *Kirchmann*s Vortrag „Wertlosigkeit der Jurisprudenz als Wissenschaft" von 1847, der Skandal und Unbehagen schuf, war Kirchmanns Gegenwirkung und Protest gegen die selbstgefällige Theorie als ein Praktiker (Larenz, (n 1) 43*)*.

98 Haferkamp, (n 37) 90.

99 Jhering, (n 10) 339, 347 (*„in demselben [erblickt] nur einen Gegenstand […], an dem das sich selber überlassene, seinen Reiz und Zweck in sich selber tragende logische Denken sich erproben kann"*).

100 Larenz, (n 1) 45.

101 Jhering, (n 10) 305; *„Kultus des Logischen, der die Jurisprudenz zu einer Mathematik des Rechts hinaufzuschrauben gedenkt"* (312).

102 Jhering, (n 83) 301 ff; Jhering, (n 10) 261, 343 ff.; Mecke, (n 72) 431, 618, 641.

103 Jhering, (n 10) 362 ff.; Behrends, (n 9) 101, 103; *Jhering* qualifiziert den römischen Juristen *Paulus* als den römischen Begriffsjurist schlechthin (Jhering, (n 91) 283 ff).

104 Rudolf von Jhering, *Pandektenvorlesung nach Puchta: ein Kollegheft aus dem Wintersemester 1859/60* (2008) 32; *Jhering* erklärte dies wie folgt: *„Das Leben ist nicht der Begriffe, sondern die Begriffe sind des Lebens wegen da. Nicht was die Logik, sondern was das Leben, der Verkehr, das Rechtsgefühl postuliert, hat zu geschehen, möge es logisch, notwendig, oder unmöglich sein"*; Henkel, (n 11) 16; Jhering, (n 10) 363.

Jhering kritisierte nach Entfernung von der Volkgeistlehre das Juristen-Gewohnheitsrechtskonzept der Historischen Rechtsschule als *„unregelmäßig“*, da sie die *„vermeintliche Bestimmtheit“* des Gewohnheitsrechts lobt, aber die Überlegenheit der Fortschritte ignoriert, die die Gesetze bringen. Für *Jhering* gelten neben Wissenschaft und Gerichtsbarkeit auch die Gesetze als technisches Element des Rechts.[105]

II. Jherings Auseinandersetzung mit Rechtsgenese und Rechtswandel

Nachdem *Jhering* erkannt hatte, dass rein formales Denken dem Recht schaden und einen *„Fatalismus der juristischen Logik“*[106] zeitigen könne, stellte er die *„substantielle Gerechtigkeit“* und *„Nutzen, Interesse [und] Wert“* ins Zentrum seines Rechtsverständnisses.[107] So wich die Wissenschaftsgläubigkeit der Wissenschaftskritik.

Insofern markiert das Jahr 1859 eine Zäsur im Denken *Jherings*.[108] *Jhering* wandte sich der *„pragmatischen Jurisprudenz“* zu, in der die Rechtsordnungen der Lebensrealität und ihren praktischen Anforderungen mehr Bedeutung beimessen als dem tiefen Verständnis des Rechts[109]. Damit widmete er sich auch den soziologischen Aspekten der Rechtsphilosophie.[110]

Die Theorie bezüglich der Entstehung des Rechts von *Savigny* und *Puchta* war die herrschende Meinung.[111] Die Entstehung und Geltung des Rechts verbindet *Jhering* ab den 1850er Jahren, anders als *Puchta*, mit *„Geist des Volks und der Zeit“*, nicht lediglich mit dem *„Volksgeist“*.[112] Nach seiner rechtswissenschaftlichen Umorientierung sah *Jhering* die Quelle der Rechtsbegriffsentwicklung in der *„Gesellschaft selber“*, bestehend aus der *„Summe der Individuen“* und *„den Zwecken und Anforderungen, die, fort und fort sich stets neu erzeugend, unwiderstehlich an sie herantreten […]“*.[113] So entfernte er sich von *Puchta*s Ideen, die den Rechtsbegriff als (vom Gott dem Volk) *„eingepflanzte Rechtsidee“* betrachtete.[114]

105 Behrends, (n 9) 97, 190.

106 Jhering, (n 10) 339.

107 Mecke, (n 72) 349; Rudolf von Jhering, *Der Zweck im Recht Bd 11* (Leipzig: Breitkopf und Härtel 1. Aufl 1877) 234.

108 Mecke, (n 72) 13.

109 Seinecke, (n 83) 168; Larenz, (n 1) 46; Josefa Birr, *Der Schatten des Wanderers – Einzelfall, Rechtswandel und Fortschritt in Rudolf von Jherings Lehre vom Rechtsgefühl, Herleitung eines Mehrebenenmodells seines komplexen Rechtsgefühlsbegriffs* (Berlin: Duncker & Humblot 2022) 222, 223.

110 Mecke, (n 72) 17.

111 Jhering, (n 73) 12, 17.

112 Mecke, (n 72) 633.

113 Jhering, (n 106) 511, 522 ff., 536.

114 Puchta, (n 14) 20.

Er lehnt die Ansicht der Historischen Rechtsschule ab, dass das Recht nur den *status quo* stabilisiere.[115] Damit verneinte er eine Fortbildung des Rechts allein durch Rezeption des römischen Rechts oder durch dessen Anpassung an nationale Umstände.[116] Für ihn stellt sich die Frage, was *„zweckmäßiger"* ist, i.e. was den *„Bedürfnissen"* besser entspricht.[117]

Auf das Problem der Rechtsquelle antwortet *Jhering* mit der *„geschichtliche(n) Vernunft"*.[118] Anstelle der Theorie *Savignys* ersetzt er eine „*Evolutionstheorie des Werdens"*, in der die Rechtswissenschaft durch den Einfluss auf den Gesetzgeber eine progressive politische Führungsrolle erfüllt.[119] Das sogenannte Rechtsgefühl speise sich aus dem praktischen Leben selbst und sei daher wie dieses einem steten Wandel unterworfen.[120] Das nationale Rechtsgefühl – für *Jhering* geradezu die Kraft des Staates – bilde sich aus der Summe des jeweiligen Rechtsgefühls des Einzelnen.[121]

Die Verbindung zwischen Rechtsgeschichte und Rechtsphilosophie fördere das rechtswissenschaftliche Bewusstsein, welches maßgebend für die Rechtsdogmatik sei.[122] Während die Rechtsgeschichte die Entstehung der Rechtsinstitute zum Gegenstand hat, erörtert die Rechtsphilosophie ethische Grundprinzipien, die dem gesellschaftlichen Zusammenleben zugrunde liegen.[123] Die sogenannte „*Geschichtsphilosophie*" (Evolutionstheorie) *Jherings* entspringe daher einer evolutionären Rechtsvernunft.[124] So bedingen historische Ereignisse als Resultat sich verändernder gesellschaftlicher Bedingungen die *Evolution des Rechts*.[125]

115 Dreier, (n 80) 228.

116 Karsten Schmidt, „Jherings Geist in der heutigen Rechtsfortbildung – Ein Streifzug durch den „Geist des römischen Rechts" aus heutiger Sicht" in Behrends O (Hg), *Privatrecht heute und Jherings evolutionäres Reschtsdenken* (Köln: Schmidt 1993) 103, 104.

117 Schmidt, (n 116) 103, 104.

118 Klaus Luig, „Rudolf von Jhering und die historische Rechtsschule" in Okko Behrends (Hg), *Jherings Rechtsdenken. Theorie und Pragmatik im Dienste evolutionärer Rechtsethik* (Göttingen: Vandenhoeck und Ruprecht 1996) 255 ff.

119 Luig, (n 118) 257.

120 Franz-Xaver Kaufmann, „Rechtsgefühl, Verrechtlichung und Wandel des Rechts" in Jahrbuch für Rechtssoziologie und Rechtstheorie 10 (1985), Das sogenannte Rechtsgefühl, 196; Rudolf von Jhering, *„Ueber die Entstehung des Rechtsgefühles"* in ders., Ueber die Entstehung des Rechtsgefühles (Napoli: Jovene Editore 1986) 19; Klaus Obermayer, „Über das Rechtsgefühl" in JZ 41 (1986, Nr 1) 1; Luig, (n 118) 259; Birr, (n 109) 221.

121 Jhering, (n 73) 74 ff; Rainer Schützeichel, „Soziologie des Rechtsgefühls" in Hilge Landweer und Dirk Koppelberg (Hg), *Recht und Emotion / Verkannte Zusammenhänge* (Freiburg / München: Alber 2016) 71; seit 1865 sah er die Einzel- und Gruppeninteresse in der Gesellschaft als Ursache für den Inhalt des Rechts. Das heißt, dass die Grundlage der Rechtsbildung, der einheitlichen Volksgeist, in der Rechtsentstehungslehre ihre Gültigkeit verlor (Mecke, (n 72) 634).

122 Behrends (n 9) 47-48; Shigeo Nishimura, „Jherings verfassungspolitische Ratschläge an die japanische Regierung und die Verleihung des Ordens" in Okko Behrends (Hg), *Jherings Rechtsdenken. Theorie und Pragmatik im Dienste evolutionärer Rechtsethik* (Göttingen: Vandenhoeck und Ruprecht 1996) 99; Okko Behrends (Hg), *Privatrecht heute und Jherings evolutionäres Reschtsdenken* (Köln: Schmidt 1993) 7 ff.

123 Behrends, (n 122) 99.

124 Dreier, (n 80) 227.

125 Behrends, (n 122) 100; ähnliche Ansätze im römischen Recht: Wolfgang Fikentscher, *Frühe und religiöse Rechte, romanischer Rechtskreis* (Tübingen: Mohr 1975) 361 ff.

Jeder Rechtsatz entspringt *Jhering* zufolge seinem Zweck; dieser[126] ist *„der Schöpfer des gesamten Rechts"*.[127] *Jhering*s neue Ansicht erfordert ein umfassendes Verständnis der Rechtsnorm, in dem er die soziologische einer logisch-formalistischen Analyse vorzieht.[128] Durch diese Sichtweise entfernt sich *Jhering* von der Begriffsjurisprudenz und nähert sich dem Rechtspositivismus an.[129]

Dabei liege der Schwerpunkt im Gegensatz zum Rechtspositivismus auf dem Rechtsverständnis der Gesellschaft und nicht primär auf dem des Gesetzgebers (*„Gesetzgeber als Person hinter der Gesellschaft"*). Dementsprechend tat *Jhering* sich als Exponent der Interessenjurisprudenz hervor, da die Betrachtung der Gesellschaft als wahrer Akteur voraussetzt, das kausale Interesse untersuchen zu wollen.[130]

Dabei unterliegen die gesellschaftlichen Zwecke des Rechts keiner Rangordnung. Jeder Rechtssatz muss nach seiner sozialen Funktion bewertet werden, da ebendiese elementarer Teil des Daseins ist. Diese Auffassungsweise bringt die teleologische Einstellung zum Recht mit sich.[131]

Der Schöpfer des Rechts sind nicht der Gesetzgeber oder besagter Zweck, sondern das ebendiesen Zweck verfolgende Subjekt;[132] dieses Zwecksubjekt ist Teil der Gesellschaft.[133] Nach *Jhering* ist *„die gegenseitige Förderung der Zwecke aller ihrer Mitglieder"* der Grund für die Existenz von Staaten und auch Vereinen oder Verkehrsgesellschaften.[134]

Eine Gesellschaft bedarf eines ständig zu befolgenden Regelungswerks *„zur Sicherung ihrer Lebensbedingungen"*.[135] Deshalb ist der Zweck aller Rechtssätze *„die Sicherung der Lebensbedingungen der Gesellschaft"* und so *„die Gesellschaft […] das Zwecksubjekt derselben"*.[136]

Der Widerspruch zum Rechtsgefühl der bei formalistischem Verständnis des römischen-gemeinen Rechts gewonnenen Entscheidung im berühmten

126 *Jhering* meinte nicht die immanente Teleologie der Rechtssätze, sondern praktische Zwecke (Larenz, (n 1) 46).

127 Jhering, (n 106) 104; Behrends, (n 9) 124.

128 Larenz, (n 1) 48; Mecke, (n 72) 25.

129 Larenz, (n 1) 47; jedoch ist er auch gegen *„schlechte(n) Positivismus. Er betrachtet die Richter nicht als bloß Subsumtionsautomaten"* (Behrends, (n 9) 98).

130 Wolf, (n 32) 157; Behrends, (n 9) 100; Larenz, (n 1) 46, 47.

131 Behrends, (n 9) 124, 125; Larenz, (n 1) 48; Dreier, (n 80) 231.

132 Larenz, (n 1) 46.

133 Jhering, (n 82) 318; *„[…] die Gesellschaft [handelt] ein Zusammenwirken für gemeinsame Zwecke, bei dem, jedem indem er für andere, auch für sich und indem er für sich, auch für andere […]"* (Jhering, (n 106) 87).

134 Larenz, (n 1) 46; Jhering, (n 106) 87.

135 Larenz, (n 1) 46; das Recht ist die Regel, *„die Form der durch die Zwangsgehalt des Staates beschafften Sicherung der Lebensbedingungen der Gesellschaft"* (Jhering, (n 106) 443).

136 Jhering, (n 106) 462; zwei Prinzipien galten bei *Jhering* bis zu seinem Tod: Das Gleichheitsprinzip als Voraussetzung für Recht und die Freiheit der Einzelnen (Mecke, (n 72) 27).

Doppelverkaufsfall[137] begünstigte *Jhering*s Umschwung.[138] Fälle wie dieser ließen *Jhering* die Bedeutung des Rechtsgefühls erkennen.[139] *Jhering* behauptet, dass die durch Gerechtigkeitsgefühl überprüfbare Angemessenheit einer rechtlichen Entscheidung von der rechtswissenschaftlichen – derlei Zweckerwägungen bislang unberücksichtigt lassenden – Wahrheit zu unterschieden sei.[140]

Das individuelle Rechtsgefühl ist somit Kontrollmechanismus für jede Rechtsentscheidung.[141] Das Rechtsgefühl entsteht dementsprechend aus innerer Überzeugung.[142] *Jhering* befindet jedoch auch eine bloße unreflektierte Gefühlsjurisprudenz für ungerecht.[143]

Der Systemgedanke spielte im Denken *Jhering*s stets eine wichtige Rolle, indes maß er ihm nach besagtem Sinneswandel eine andere Bedeutung zu. Das System im Recht sei in der wissenschaftlichen Betrachtung nicht Eingangs-, sondern Endpunkt.

*Jhering*s wissenschaftskritische Wende bedeutete nicht, auf die Produktivität der Rechtswissenschaft zu verzichten, sondern lediglich, dass er sie der Kontrolle des individuellen Rechtsgefühls unterordnete. Nach der eigenen wissenschaftskritischen Wende trennte *Jhering* – im Gegensatz zu *Puchta* – die Rechtswissenschaft und die Rechtsprechung voneinander und qualifizierte gleichsam die Rechtswissenschaft als *„Rechtsinhaltsquelle"* und nicht als *„Rechtsgeltungsquelle"*.[144] Heutzutage herrscht, in Anlehnung an *Jhering*, die Ansicht, dass die Rechtswissenschaft keine genuine Rechtsquelle, sondern Rechtsinhaltsquelle ist.[145]

137 Ende 1858 erstellte *Jhering* als Angehöriger der Gießener Spruchfakultät ein Gutachten. *Jhering* wollte eigentlich *„[…] nachweisen, daß nach der Intention des römischen Rechts der Verkäufer bei doppeltem Verkauf und erfolgtem Untergang der Sache nur einmal den Kaufpreis fordern kann, einerlei ob er den zweiten Kontrakt bona oder mala fide abgeschlossen und einem der Käufer bereits die Sache tradirt hätte oder nicht"* (Kroppenberg, (n 78) 76 ff). Er wusste aber, dass der römisch-gemeinrechtliche Grundsatz *„periculum est emptoris"* dagegen sprach. Im Gutachten zum Doppelverkaufsfall widersprach *Jhering*s Lösung dem gesunden Menschenverstand. Mit diesem Vorfall wurde ihm die Unzulässigkeit der historischen Rechtsschule bewusst (Kroppenberg, (n 78) 22-30).

138 Mecke, (n 72) 19; der Begriff *„Umschwung"*: Jhering, (n 10) 337, 338; Jhering, (n 104) 29 ff.

139 Mecke, (n 72) 347; *„Das Recht ist keine gefühlsfreie Zone, sondern, im Gegenteil, das Recht ist konstitutiv auf Gefühle erwiesen"* (Schützeichel, (n 121) 94.)

140 Mecke, (n 13) 812; Mecke, (n 72) 640; Ernst-Joachim Lampe (Hg), *Das sogenannte Rechtsgefühl* (Opladen: Westdeutscher Verlag 1985) 72 ff.

141 Kjell A. Modéer, „Jherings Rechtsdenken als Herausforderung für die skandinavische Jurisprudenz" in Okko Behrends (Hg), *Jherings Rechtsdenken. Theorie und Pragmatik im Dienste evolutionärer Rechtsethik* (Göttingen: Vandenhoeck und Ruprecht 1996) 154; Birr, (n 109) 217; *„Das abstrakte Denken durch das Kasuistische kontrolliert würde, indem man es sich zum Prinzip mache, bei allen Rechtssätzen Begriffen […] ihre Anwendung an einem konkreten Fall zu veranschaulichen und sie daran die Probe bestehen zu lassen*" (Jhering, (n 10) 366).

142 Mecke, (n 72) 19; vgl Schützeichel, (n 121) 69.

143 Jhering, (n 106) 434.

144 Mecke, (n 17) 554.

145 Mecke, (n 17) 554.

D. Zusammenfassung und Fazit

Das Ziel dieser Arbeit war es, die Bedeutung und systematische Stellung *Puchta*s *„Genealogie der Begriffe“* zu erläutern und in Bezug darauf, *Jhering*s Kritik an *Puchta*s Methode sowie seine eigene Auseinandersetzung mit Rechtsgenese und Rechtswandel zu erklären, um einen Theorievergleich zu formulieren.

Dieses Thema umfasst viele philosophische, soziologische und sogar wirtschaftliche Aspekte. Sowohl die Methodik *Puchta*s als auch die Methodik *Jhering*s sind von Bedeutung für die Geschichte und Entwicklung der Rechtsmethodik. Das Verständnis dieser Juristen erleichtert daher auch das Verständnis der heutigen Methodenlehre.

Puchta entwickelte mit seiner „*Genealogie der Begriffe*“ einen juristischen Formalismus, indem er in seiner Methodik zwischen einer systematischen und historischen Seite des Rechts differenzierte. Die Begriffsjurisprudenz betrachtet das Recht als ein *„geschlossenes System von Rechtsbegriffen“* und beschränkt die Funktion des Richters auf *„logische Subsumtion der Sachlage unter die Rechtsbegriffe“*. Ein Richter darf nur dann die praktischen Bedürfnisse dieses Systems verlassen und auf dem Volksgeist beruhende neue Rechtssätze bilden, wenn er aus dem System keine *„feste, wohlbegründete Überzeugung“* erschließen kann.

Der Methode *Puchta*s wird heutzutage ob ihrer Außerachtlassung changierender Lebensrealitäten keine große Relevanz mehr beigemessen. Dennoch ist nicht zu leugnen, dass die Historische Rechtsschule sich durch ihre systematische Herangehensweise um eine voraussehbarere, weniger willkürliche Rechtsanwendung verdient gemacht hat.

Sowohl *Puchta* als auch der junge *Jhering* stellten den Anspruch der Wissenschaftlichkeit an die Beschäftigung mit dem Recht. Die Begriffsjurisprudenz erachtete die römischen Rechtsquellen als Nonplusultra und versuchte sich in ihrer Systematisierung. Dementsprechend bildet nicht die Textwissenschaft, sondern die Begriffswissenschaft die Grundlage der Jurisprudenz. Diese Rechtsbegriffe bilden zusammen das geltende Recht. Nach *Puchta* ist die Aufgabe der Rechtswissenschaft, die *„systematische und historische Genealogie der vorhandenen rechtlichen Begriffe[n]“* darzustellen und zu ergänzen. In diesem Sinne ist die Rechtswissenschaft eine selbstständige und *„ergänzende“* Rechtsquelle, die bei Lücken zu Rate gezogen wird.

Dies bedeutet, dass in der *Puchtas „Genealogie der Begriffe“* eine überpositive Grundlage besteht. Von dieser Warte aus unterscheiden sich Begriffsjurisprudenz und Rechtspositivismus. Auch die Legitimation der vom Gesetzgeber aufgestellten Rechtsbegriffe beruht auf diesem Begriffssystem. Dementsprechend kann der Gesetzgeber nicht beliebig über Recht entscheiden – darin liegt ein weiterer Unterschied zum Rechtspositivismus.

Jhering kritisierte *Puchta*s Methode als formalistisch, positivistisch, gerechtigkeitsignorant und praxisfern. Die Kritik der Freiheitsrechtsschule und der Interessenjurisprudenz an der *Puchta*-Genealogie entzündete sich an der behaupteten Entfernung der Rechtswissenschaft von der gesellschaftlichen Wirklichkeit. Daher wurde die Gegenbewegung zu *Puchta* auch aus der Soziologie und nicht nur aus der Philosophie geboren.

Jhering scheint in vielen seiner Kritikpunkte Recht behalten zu haben. Zum Beispiel sind in der Begriffsjurisprudenz viele für unmöglich respektive mit der *ratio scripta* für unvereinbar erachtete juristische Institutionen/Begriffe im heutigen Recht bereits umgesetzt.

Die Zäsur im Denken *Jherings* brachte die starke Gewichtung der Billigkeit im Rechtsdenken (*aequitas*) unter Einbeziehung des Rechtsgefühls und die Suche nach probaten rechtlichen Antworten auf neue gesellschaftliche Probleme mit sich.

Seit den 1880er Jahren verabschiedete man sich zusehends von der systematischen Behandlung der römischen Rechtssätze und somit von der dogmatischen Starrheit des deutschen Rechts– die Berücksichtigung von *Jhering*s *„Zweck im Recht"* griff um sich. So herrscht in der Interessenjurisprudenz das *„Primat der Lebensforschung und Lebenswerte"*, in der Begriffsjurisprudenz jedoch das Primat der Logik.

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RESEARCH ARTICLE

Negotiorum Gestio As a Source of Obligation: From Roman Law to Modern Codes

Baha Yiğit Sayın *

Abstract

The legal institution of *Negotiorum Gestio* refers first and foremost to the act of helping or aiding someone in need, typically with the intention of doing good or promoting the well-being of the recipient. This concept has a long history, with roots in Roman law and its diversified influence on modern legal systems. In this article, we explore the evolution of *negotiorum gestio* from its origins in Roman law to its current manifestation in modern civil codes while providing an examination of how the concept has been defined, understood, and applied within Roman law over time as well as of its long journey through out *ius commune* to the modern codification era. Being a strictly Roman law institution, the prevalent incorporation of negotiorum gestio into the codes of the 'civil law' jurisdiction as well as its designation as one of the sources for non-contractual obligations under the harmonized rules of 'EU Rome II Regulation' calls for a close-in analysis of this originally Roman concept which will shed light on the degrees of the evolution, transformation and reception it had experienced while helping to make sense of its current state in modern civil law.

Keywords

Negotiorum Gestio, Actio Negotiorum Directa, Actio Negotiorum Contra, Genuine Negotiorum Gestio, Non-Genuine Negotiorum Gestio, Mandate

* **Corresponding Author:** Baha Yiğit Sayın (Asst. Prof. Dr.), Koç University, Faculty of Law, Department of Roman Law, Istanbul, Turkiye. E-mail: ysayin@ku.edu.tr ORCID: 0000-0001-9171-3791

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Introduction

Negotiorum gestio is a civil law institution originating from Roman law; and amongst the many other private law concepts and relations which find their roots in Roman law, it is arguably one of the most 'Roman'. While *negotiorum gestio* is a part of all modern legal systems which are said to belong to the 'civilian tradition',[1] we do not, for example, see a similar institution in 'Islamic law',[2] or common law, which is said to reject the principal behind *negotiorum gestio,*[3] owing to its 'individualistic' character.[4] This lack of the legal acknowledgement of the 'officious intermeddling' is a facet of common law which had been repeatedly confirmed by precedents.[5]

1 For an account of the 'civil law tradition' *see* Alan Watson, *The Making of Civil Law* (Harvard University Press 1981); Adnan Güriz, *Hukuk Başlangıcı* (Siyasal Kitabevi 1997); Glenn, H. Patrick*, Legal Traditions of the World* (4th ed, OUP 2010) 137 et seq. For a comparison with common law *see*, Peter J. Hamilton, 'The Civil Law and Common Law' (1922) 36 (2) Harvard Law Review 180-192; Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966-67) 15 (3) American Journal of Comparative Law 419-435; Kadir Gürten, 'Roma Hukuku ve İngiliz Hukuku'na Karşılaştırmalı bir Bakış' (2016) 65 (1) AÜHFD 183-197.

2 There is no institution in Islamic law that can be construed to be the equivalence of '*negotiorum gestio*'. Notwithstanding that Islamic Law does actually define the 'unauthorized' (*fuzuli*) in legal terms as "someone who, without any legal permission, deals with the property of some other person"; it would not be wrong to assert that the benevolent intervention of the *fuzuli* is not recognized as a source of obligation and accordingly lacks any kind of a general principle resembling *negotiorum gestio*'s within the Islamic jurisprudence. It does not matter whether the intervenor is managing the business for the 'principal's interest' or for 'his own benefit'; neither is admitted. The only exception can be the case where someone finds another's 'exposed child', lost property' or 'fugitive slave'. Then, the finder might be entitled to the reimbursement of his 'maintenance expenses' (compare with Turkish Civil Code/TMK art 769); for more on this issue, *see* Haluk Tandoğan, *Mukayeseli Hukuk ve Hususiyle Türk – İsviçre Hukuku bakımından Vekaletsiz İş Görme* (Ankara Hukuk Fakültesi Yayınları 1957) 10-13; also *see Mejelle* art. 111-113; 365, 368, 1453. Additionally, in certain cases of maritime rescue and salvage, the rescuer/salvager may be granted a renumeration the value of which is to be determined by customs; *see* İbn Teymiyye, Kütüb ve Resail ve Feteva, XXX, 166, 414-415; Buhûtî, Ravdu'l-Murbi', II, 442-443. The main requirement sought for reimbursement is that the rescuer/salvager did act to be reimbursed, not for the love of God, though it probably would have been more preferable.

3 *See* fe Peter Birks*, An Introduction to the Law of Restitution* (Clarendon Press, 1936) 31; R. M. Jackson*, The History of Quasi- Contract in English Law* (Cambridge University Press 1936) 124; Robert Goff & Gareth Jones, *The Law of Restitution* (Sweet & Maxwell 1966) 246-247; Jack Beatson (ed), *Anson's Principles of the English Law of Contract* (28th ed, OUP 2002) 600 et seq; Andrew Borkowski, Paul du Plessis, *Textbook on Roman Law* (3rd ed, OUP 2005) 313. For U.S. Law *see*, American Restatement (Third) of the Law of Restitution and Unjustified Enrichment, 2011, § 2 (3) which states that "*there is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract*' and § 2 (4) which declares that "*liability in restitution may not subject an innocent recipient to a forced exchange"*. For the strong claim that in certain instances, such as in cases of 'agency of necessity', 'necessitous intervention' and 'rescue', the prospect for relief appears to be available to the intervenor, albeit as part of piecemeal solutions rather than under a unified doctrine; *see,* William R. Anson, Principles of English Law of Contract and of Agency in Its Relation to Contract (18th ed, OUP 1937) 600; also *see* Duncan Sheehan, Negotiorum Gestio: A Civilian Concept in Common Law (2006) 55 International and Comparative Law Quarterly 253-279. It is obvious that while the Roman law concept of '*negotiorum gestio'* is not present within the common law terminology, similar remedies are considered in similar circumstances. Thus, it would not be wrong to state that whilst common law does not categorically acknowledge the Roman law institution of '*negotiorum gestio*', it does adapt the solutions presented within the historical development of '*negotiorum gestio'* in a selective and restrictive manner especially under the jurisprudence and jurisdiction of ecclesiastical and maritime courts owing to the Roman law influence; see Thomas Edward Scrutton, 'Roman Influence in Chancery, Church Courts, Admiralty and Law Merchant' in *Select Essays in Anglo-American Legal History*, Vol. I, (Little, Brown & Company 1907) 233. Lastly, regardless of its position within the common law jurisprudence it is apparent that by art 11 of Rome II Regulation which consider '*negotiorum gestio*' as one of the four non-contractual sources of obligations within the EU jurisdiction, the civil law institution of '*negotiorum gestio*' is nonetheless a part of the 'conflicts of law' of United Kingdom -even after Brexit-; *see* sec. 11 of The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (https://www.legislation.gov.uk/uksi/2019/834/contents) accessed 30 March 2023.

4 On the supposed 'individualistic' nature of common law which is said to value the unfettered freedom of the individuals and strive to foster their self-sufficiencies, *see* Edward W. Hope, 'Officiousness' (1929) 15 Cornell L. Rev. 25-27; Peter Birks, 'Negotiorum Gestio and Common Law' (1971) 24 CLP 110-112; Reinhard Zimmerman, *The Law of Obligations Roman Foundations of the Civilian Tradition* I I (OUP 1999) 448.

5 For the general principle of common law concerning the work and labour done or money expended by a person in order to preserve or benefit the property of someone else, *see Falcke v Scottish Imperial Insurance Co*. (1886) 34 Ch 234 which

In its long journey to modern law, the essence of the institution of *negotiorum gestio* did transform very little and for thousands of years stayed true to its Roman roots. Today, what we understand from a relation akin a '*negotiorum gestio',* however it may be termed as, is that one person -without authority- manages the business of another while having a motive that is not gratuitous, burdening the other party as a result.[6] A modern comparative review of the duties and rights of the parties to a *negotiorum gestio* shows a conceptual sameness with slight variations in some technical aspects which are felt more in practice -as in the form of Court decisions- then in theory. And notwithstanding the fact that the modern terminology of '*negotiorum gestio*' is abundant, we will be preferring to employ the Roman terminology for the sake of a historical continuum and conceptual unity.

The person managing another's business might be doing this because: a) he may be willing to help out another under necessity or urgency b) he may be falsely thinking he is managing his business c) he is managing his own business together with another's d) he may be in bad faith and managing another's business deliberately, thus committing a tort. In all these cases, since Roman times, there rises a *negotiorum gestio* and both parties assume duties and gain rights against each other. With this study, the historical journey of '*negotiorum gestio'* from Roman law to modern law will be analyzed comparatively while trying to make sense of the commonalities and the discrepancies between both the historical modes of developments and the contemporary legal conceptualizations of '*negotiorum gestio*'.

I. *Negotiorum Gestio* in Roman Law

A. *Negotiorum Gestio* as A Source of Obligation in Roman Law

In Roman classical law the sources of obligation were mainly divided into contracts and wrongful acts (delicts), as evident in the distinction made by *Gaius* in

states that under English law, such acts "do not create any lien upon the property saved or benefitted, nor, even if standing alone, create any obligation to repay the expenditure." and that "… Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."; also *see Macclesfield Corp. v. Great Central Ry* (1911) 2 K.B. 528, 104 L.T.R. 728 (C.A.); *Hawtayne v. Bourne*, (1841) 7 M. & W. 595, 599, 151 E.R. 905, 906-907; *Cox v. Midland Counties Ry. Co*. (1849) 3 Ex. 268, 277 -78, 154 E.R. 844, 847-48.

6 On the English terminology of *negotiorum gestio, see* Christian von Bar, Benevolent Intervention in Another's Affairs in Christin von Bar (ed), *Principles of European Law: Benevolent intervention in another's affair* (Sellier, 2006) 53-54, 101. Bar prefers the term 'benevolent intervention in another business' while at the same time emphasizes that it is far from being a technical and binding, final term. Throughout this article, we use the terms "*negotiorum gestio*", "intervention in another's affairs" and "management of another's business" as well as "*gestor*", "principal", "*dominii*" and "intervenor". The choice of terminology or the preferences to switch between Latin and English is not an indication of any substantive doctrine but rather an outcome of the lack of precise corresponding technical terms which will address all the primary and secondary elements of the institution in an encompassing fashion. For more on this issue *see* Tandoğan, *Vekaletsiz İş Görme* (n 2) 21-24. Also *see* Lousiana Civil Code (Title V. Chapter 1- Management of affairs <Negotiorum Gestio> art. 2292: 'There is a **management of affairs** when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances') which prefers the English translation of the French '*gestion d'affaires*': 'management of affairs' while keeping '*negotiorum gestio*' in the title.

his *Institutiones*[7] which was written around the second half of the century.[8] However, this distinction was quite imperfect since there were various other legal relations which burdened their parties with duties & obligations and/or granted them certain rights & privileges. Still, it was not until the Justinian Codification that those 'legal relations' started to be classified differently under the umbrella term of '*quasi*'.[9] In that regard, '*quasi*' was not only used to indicate 'contract like' relations but also to designate some wrongful acts which, although resembling them to a certain extent, were not considered to be delicts; hence the term: '*quasi*-delicts'.[10]

Negotiorum Gestio was a part of Roman law since earlier times, however a type of categorization where obligations were divided into 'obligations arising out of contract vs obligations arising out of quasi-contracts' was non-existent in the Roman mind. The Roman -*actiones* system-[11] which the whole Roman civil law was based upon, did not think in terms of a binary understanding of *contractus* vs *quasi contractus* (or *delictum* vs *quasi delictum*); neither did the legal literature which followed the praetorian edictal order. It was *Gaius* -and then *Justinian*- who came up with such divisions of actions, contracts and the corresponding obligations.[12] *Gaius* first did, as mentioned above, give the sources of obligations as 'contracts and delicts' in *Institutiones*. However, in a '*Digesta* text[13] referring to 'a work of his',[14] *Gaius* seems

7 *Institutiones*, is an introductory textbook of legal 'institutions' compromising 4 books and written by *Gaius* around 161 CE. For more information on *Institutiones, see* Fritz Schulz, *History of Roman Legal Science* (Clarendon Press 1946) 159 - 165; on the '*instutione*s/institutional system' *see* F. X. Affolter, *Das Romische Institutionen-System* (Adolph Emmerling & Sohn, 1897); Peter Stein, *The Fate of the Institutional System* (Huldigingsbundel Paul van Warmelo 1984) 218-254. There were several *Institutiones* written by jurists other than *Gaius* (such as *Callistratus, Paulus, Ulpianus, Aelius Marcianus* and *Fiorentinus*) but they all were of later date than *Gaius*'s; for an opposing view *see* Schulz, *History of Roman Legal Science*, 158 - 159; Schulz considers the *Fiorentinus*'s *Instituiones* to be earlier than the *Institutiones* of *Gaius*.

8 Gai.3.88 (The Institutes of Gaius, Francis de Zulueta tr, Clarendon Press 1946)).

9 The term '*quasi*' was not used until after the Justinian Codification. The term '*quasi*', in Hellenized Latin form, was first used in the Greek paraphrase of the Institutiones by *Theophilus; see* E.C. Ferrini, *Institutionum Graeca Paraphrasis Theophilo Antecessori,* Vol. 2, (Berlin: Calvary, 1884; reprint. Aalen: Scientia 1967) 3.27.3, 5; 4.5.pr. The terms of '*quasi ex contractu'* and '*quasi ex maleficio'* can be found in the Digest within texts ascribed to *Gaius* (D. 44.7.5.1,4,6), however they are most likely interpolations; *see* Salvatore Riccobono, 'La Dottrina delle 'Obligationes Quasi Ex Contractu' in *Annali del Seminario Giuridico R. Universite di Palermo*, Vol. 3-4 (1917) 280-281; Otto Gradenwitz, *Interpolationen in den Pandekten* (Weidmannsche 1887) 113-115; Theo Mayer-Maly, 'Divisio Obligationum' (1967) 2 (2) Irish Jurist new series 375-385; also *see* Ernst Rabel, Ernst Levy, *Index Interpolatium*, Vol. 3, XXXVII-L (Bohlaus 1929) 355-356.

10 For the etymology of '*quasi*', *see* Heumann's Handlexicon zu den Quellen des Römischen Rechts (9th ed, Gustav Fischer 1926) 481; Oxford Latin Dictionary (2nd ed OUP 2012) 1698, Dictionnaire Étymologique de la langue Latine, (New Edition Klincksieck 2001) 552.

11 For a detailed treatment of the Roman *actiones*, *see* Ernst Metzger, 'Actions' in Ernst Metzger (ed.), *A Companion to Justinian's Institutes* (Cornell University Press 1997) 208-228.

12 For *Modestinus*'s practical, but rather unscientific classification of obligations as 'real, verbal, real and verbal together, consensual, statutory (*lege*), praetorian (*honorariae*), compulsory (*necessitate*) and delictual'; *see* D. 44, 7, 52.

13 The *Digesta* texts and their English translations are all taken from the 'Digest of Justinian' whose Latin text is edited by Theodor Mommsen & Paul Kruger, and the English translations are edited by Alan Watson; (Digest of Justinian, University of Pennsylvania Press, 1986).

14 *Res cottidiane* (also called as *libri aureorum*). It must be reminded here that there is no certainty about neither the identity of the genuine author of *res cottidiane* nor about the time it was penned. It is possible that the authorship of res *cottidiane* can be attributed to *Gaius* himself while it is also conceivable that a pseudo-*Gaius* from the post-classical period is actually the real author. Modern doctrine tends to favor *Gaius* as the author of *res cottidiane*. For more on this issue *see* Tony Honore, *Gaius* (Clarendon Press 1962) 68, 96, 115.

to add a third source:[15] "*variis causarum figuris*" (various other causes) which, later, Justinian expounded on and classified into two as 'quasi-contract' and 'quasi-delict'.[16]

As seen, the sources of obligations in Roman law had been diversified over time. Initially, the only sources of obligation acknowledged by Romans were contracts and delicts, however it did not take long before the activity of the praetor did result in new sources being conceptualized, first under the non-scientific and ambiguous term of '*variis causarum figuris*', and then by the incorporation of the -conjunction/adverb- '*quasi*'[17] to the terms of 'contract' and 'delict' respectively. [18]

Thus, the relation that is *negotiorum gestio* was not considered as a separate source of obligation until post-classical period; and there is no evidence claiming otherwise; however, this also does not mean that the concept of *negotiorum gestio* was not a part of Roman law before the post-classical period. On the contrary, since republican times '*negotiorum gestio'* seems to serve as an institution which was resorted to rather frequently for various causes. The reason for this frequency can be explained partly by the lack of 'agency' (or to put it differently: direct representation) in Roman Law[19] and partly by the republican aristocratic ideals of *humanitas* (humanity/humane tendency) and *officium amici* (moral duty deriving from familial relationship or mere friendship). The Roman jurists regarded 'liberty' in high esteem and accordingly it may be argued that their private law showed a strong individualistic bend.[20] But as liberty required certain borders,[21] individuality was never to be without its limitations.[22] For the Romans, the ethical system standardized by the concepts of *pietas* - *officium* -

15 D. 44.7.1 pr: "*Obligationes aut* ***ex contractu*** *nascantur aut* ***ex maleficio****, proprio quodam lure* ***ex variis causarum figuris***". (Obligations arise either from contract or from wrongdoing or by some special right from various types of causes).

16 I Ins. 3.13.2: "…*Sequens divisio in quattuor species deducitur: aut enim* ***ex contractu*** *sunt aut* ***quasi ex contractu*** *aut* ***ex maleficio*** *aut* ***quasi ex maleficio****…."* (..A further division separates them into four kinds: for they arise *ex contractus* or *ex quasi contractus, ex maleficio or ex quasi malificio*….)

17 For the hypothesis that the term '*quasi'* and the idea behind it were inventions of *Gaius* himself, see Max Radin, 'The Roman Law of Quasi-Contract' (1937) 23 (3) Virginia Law Review 241, 246-247.

18 The problem here is also related to the translation of the term '*quasi contractus*': if '*quasi*' is taken as a conjunction then the meaning of '*quasi contractus*' would be 'as if a contract'. However, if '*quasi*' is taken as an adverb then the translation would be akin to 'almost a contract'. The Turkish translation of '*quasi contractus*' is '*sözleşme benzeri'* which would correspond to the term 'as if a contract'; *see* fe Mustafa Dural, 'Roma Hukukunda Akit Benzerleri -Quasi Contractus-' (2011) 33 (3-4) İÜHFD 257. Another similar translation observed in Turkish jurisprudence is the term of '*quasi* juristic acts' which is translated as '*Hukuki İşlem Benzeri*'; see Kemal Oğuzman, Nami Barlas, *Medeni Hukuk* (28th edn, On İki Levha, 2022) 164-165; Necip Kocayusufpaşaoğlu, Hüseyin Hatemi, Rona Serozan, Abdülkadir Arpacı, *Borçlar Hukuku Genel Bölüm*, I (7th edn, Filiz 2017) 84. We personally believe the technical difference between the use of *quasi* as a 'conjunction' and an 'adverb' would lie in the assumption that a relation which is 'as if a contract' would share more common characteristics with a genuine contract compared as to a relation which is 'almost a contract' and therefore, concur with the translation of '*quasi*' to '*benzeri*' in the context of Turkish Civil Law. Also *see* Peter Birks, Grant MacLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone' (1986) 6 OJLS 46-85.

19 For the supposed reasons of this lack of agency in Roman Law, *see* Zimmerman, *Law of Obligations* (n 4) 47-49; Haluk Emiroğlu, 'Roma Hukukunda Vekalet Sözleşmesi (Mandatum) ve Hukuki İşlemlerde Temsil' (2003) 52 (1) AÜHFD 101, 109-110; Özcan Karadeniz Çelebican, *Roma Hukuku*, (17th edn, Turhan 2014) 265-266.

20 *see* for instance D.50.17.36.

21 For 'Liberty' (*libertas*) in Rome, *see* Chaim Wirszubski, *Libertas as a Political Ideal* (Cambridge University Press, 1950); Fritz Schulz, *Principles of Roman Law* (Marguerita Wolff tr, Clarendon Press 1936) 140 et seq.

22 Schulz, ibid 238; Schulz even goes to claim that 'Roman individualism is nothing but a legend'.

humanitas – fides – obsequuim and so forth, was not a philosophical ideal but rather a part of 'aristocratic' reality which the legal acknowledgement of relations like '*negotiorum gestio*' helped come to life.

B. The History of *Negotiorum Gestio*

The early history of *negotiorum gestio* in Roman Law is much disputed since there are various conflicting claims as regards with the legal roots and procedural origins of *negotiorum gestio*.[23] The main controversy is about the relation of *negotiorum gestio* with *ius civile* and *ius honorarium* and the scope of the actions (and *formulae*s) deriving from *negotiorum gestio*.[24] The answers to the controversy cannot be given by solely relying on the texts in hand but rather call for an analysis of the Edict's language and a deduction from its wording. However, in Schulz's words, "much more important than the technical details is the institution of *negotiorum gestio* as a whole. It is a quite original genuinely Roman creation without parallels in the laws of other peoples not dependent on Roman law".[25] Still, we believe that giving a historical account of '*negotiorum gestio*' is important regardless of the dispute concerning the early history of '*negotiorum gestio*' and of its *formulae*:

During the 2nd century BCE,[26] the promulgation of the *lex Aebutia* reformed the civil procedure by abolishing the defunct *legis actiones* and introducing the already in-practice formulary system as the new civil procedure.[27] It follows that the transformation of the *legal actiones* in to the formulary system gave procedural life to the institution of *negotiorum gestio*.[28] The *praetor*s, owing to the authority granted to them via this law, began to insert a clause of *negotiorum gestio* (*clausula de negotiis gestis*)[29] in their edicts through which they regulated the relations between the 'principal' (*dominus negotii*) and the 'intervenor' (*gestor*), 'who, 'judicially'

23 *see* fe Fritz Schulz, *Classical Roman Law* (Clarendon Press 1950) 620-624; Max Kaser, *Roman Private Law* (Rolf Dannenbring tr, 2nd edn, Butterworths 1968) 192-194; Zimmerman, *Law of Obligations* (n 4), 436-438; Hans Hermann Seiler, *Der Tatbestand der negotiorum gestio im römischen Recht* (Böhlau, 1968); Moris Wlassak, *Zur Geschichte der negotiorum gestio* (G. Fischer 1879); Tandoğan, *Vekaletsiz İş Görme* (n 2) 4 n.1-2; Joseph Partsch, *Aus Nahgelassen und Kleineren verstreueten Schriften* (Springer 1931); Alan Watson, *The Law of Obligations in the Roman Republic* (Clarendon Press 1965) 196-203, 206-207; H. Gökçe Özdemir, *Roma ve Türk Hukuklarında Vekaletsiz İş Görme* (Seçkin 2001) 17-27.

24 The reasons for the controversy may be summed up as the facts that the relevant *Corpus Iuris Civilis* (C.I.C.) texts being heavily interpolated and the scarcity of reliable sources outside the C.I.C.

25 Schulz, Classical Law (n 23), 624.

26 Sometime between 199 and 126 BCE or even later.

27 Encyclopedic Dictionary of Roman Law (The American Philosophical Society reprint 1991) 547; on *lex Aebutia* in general also *see* Max Kaser, *Die lex Aebutia* (A. Giuffrè 1950).

28 For the claim that there had been a tradition of praetorian protection in cases like *negotiorum gestio* -probably by an *actio in factum*- preceding the *lex Aebutia*; *see* Ludwig Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletian*s, Vol. 1 (Duncker & Humblot, 1908) 52, 54-58.

29 Otto Lenel, *Das Edictum Perpetuum* (B. Tauchnitz, 1927) 101; D. 3.5.1: "*Hoc edictum necessarium est, quoniam magna utilitas absentium versatur, ne indefensi rerum possessionem aut venditionem patiantur vel pignoris distractionem vel poenae committendae actionem, vel iniuria rem suam amittant*." (This edict is essential, since it is concerned with a matter of great importance to absentees, that they should not, through want of a defense, suffer the seizure or sale of their property, the disposal of a pledge or an action for incurring a penalty, or lose their property unjustly.)

protects the interests of absent persons (*absentis*) against the encroachment of third parties,[30] or takes over the management of an estate that does not appear to have any successors (*hereditas iacens*).[31] In these cases, the *praetor* granted an *actio in factum* both to the *gestor* and the *dominus negotii*. *Actio in factum* was recognized by *ius honorarium* and therefore was a praetorian action but it was not only *ius honorarium* where *negotiorum gestio* did find life; the *ius civile* had also provided a general remedy in the form of the *actio bonae fidei* (*iudicia bonae fidei*)[32], probably starting as early as the 2nd century BCE.[33] The *iudicia bonae fidei* must have had a *formula in ius concepta*[34] and considering the '*edictum de negotiis gestis'* (edict of *negotiorum gestio*)[35], there must also had been a *formula in ius factum*; hence two *formulae*s -for *negotiorum gestio*- one belonging to *ius honorarium* and the other to *ius civile*, existed side by side.[36]

Originally, citizens who left Rome for civil or military service, and then later merchants who left Italy for their business, were given the opportunity to appoint a *procurator*[37] to manage their assets.[38] Starting from the late republican era, the owner of an enterprise or a commercial undertaking could leave a friend, his freedman -or his slave- as an *institor* when he was not present.[39] The *procurator* and the *institor*, in most cases, would be the freedman of the 'principal' (*dominus negotii)* owing to the 'moral and personal bond' between the freedman and his patron,[40] however, it was also possible for the *procurator* to be a freeborn (*ingenuus*) friend of the 'principal' as evident in *Cicero*'s writings.[41] The *iudicia bonae fidei*, which was applied in such cases, later began to be used against the intervenor/*gestor* (*voluntarius*: the voluntary), who, by spontaneous initiative, managed the business owner's assets in

30 D.3.5.1.

31 D.3.5.3.6.

32 *Actio bonae fidei* (*iudicia bonae fidei*) was the contractual action of *ius civile* in which through the clause of *ex bona fide* in the *intentio* of the *formula,* the judge was given full authority to decide on the matter according to the principles of *bona fides* (good faith); see Dictionary of Roman Law (n 27) 520.

33 Bülent Tahiroğlu, Belgin Erdoğmuş, *Roma Usul Hukuku* (Filiz 1989) 34-35.

34 For the list of '*actiones bona fidae*' given by *Gaius* -which also includes *actio negotiorum gestio*- see Gai. 4.62.

35 Lenel (n 29) 101-15.

36 There is much controversy in the doctrine as to the relationship between these two *formulae*s and how they fare against each other; *see* Vincenzo Arangio-Ruiz, *Il Mandato in Diritto Romano* (Jovene 1949) 29 et seq.

37 *Procurator,* in private law, was the one who administered another's affair under his authorization (D.3.3.1.pr.). A *procurator* could be in the form of a general manager (*administrator = procurator omnium bonorum*) whose activity for the principal might had been unlimited although alienations would be excluded; *see* Dictionary of Roman Law (n 27) 654.

38 Kerra Tunca Avorel, '*Negotiorum Gestio*'nun Şartları' (1987) 3 (1-4) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi 33, 38.

39 The juristic difference between *institor* and *procurator*, if there is any, seems to be about their degree of involvement with the 'principal's business; *see* D. 14.3.5.10. However, even if there were such a difference it was obsolete by the time of Papinian; *see* D. 17.1.10.5.

40 For the peculiarities of the bond between the patron and the freedman *see* Henrik Mouritsen, *The Freedman in the Roman World* (Cambridge University Press 2011) 36-65.

41 *see* fe Cic. pro Caecina 20. 57; pro Quinctio 19.62, 28.87; pro Rosc. Amer. 7.19; ad fam. 7.32.1, 12.24, 13.43; Phil. 12.7.18, in Verr. 2.2.24.59, 2.5.7.15.

his absence.[42] The practice of helping out a fellow citizen (or neighbor/friend) on account of '*amicita officium*' and then expect to be compensated on the basis of *fides* agrees with the idealized republican sentiment to such an extent that the claims of the *iudicium bona fides* being contemporary of the *actio in factum* seem also plausible.[43]

Another root of '*negotiorum gestio'* other than the institution of '*procurator*' was the '*cura furiosi'*; that is the curatorship over 'lunatics' (*furiosi*).[44] Whoever administered the affairs of a lunatic (*furiosi*) had the action of *negotiorum gestio*.[45] *Cura furiosi*, though being a *cura*, was closer to '*tutela*' (tutelage) as regards with its content and character. Accordingly, like *tutela*, *cura furiosi* was not only about the property but also about the person himself.

The *procurator* of pre-classical times did not act under a contract of *mandatum* (mandate),[46] nor did the *curator* since he was either installed by law or by the authority of the magistrate, not by a private agreement.[47] As the *actio mandate* was not applicable in both of those cases, in order to provide a remedy, two *formulae*s (*directa* for the main claim and *contra* for the counter claim) became a part of the praetorian edict in an identical fashion only differing in the identities of the plaintiff and the defendant. [48] The requirement of this *iudicia bonae fidei* was *negotium alteris gestio* (managing the business of another) giving rise to a broader field of application as a result.[49]

Thus, even during early classical law the *negotiorum gestorum* started to cover a wide range of cases. This is an interesting fact as the origin of the '*negotiorum gestio*' seems to be historically connected to the ideas of 'absence', 'good faith', 'necessity' and 'urgency' and the praetorian extension of *negotiorum gestio* to a variety of cases is not easy to justify under such an understanding. The 'urgency' of

42 *See* Avorel (n 38) 45-47.

43 *See* fe Egon Weiss, *Institutionen des römischen Privatrechts* (2nd edn, Verlag für Recht und Gesellschaft 1949) 395; Raymond Monier, *Manuel élémentaire de droit romain*, Vol II (4th edn, Domat Montchrestien 1948) 207-208; Watson*, Law of Obligations* (n 23) 202; Hans Kreller, 'Das Edikte de negotiis gestis in der Geschichte der Geschaftsbesorgung' in *Festschrift Paul Koschaker* Vol II (Böhlaus 1939) 193 et seq.

44 On the curatorship in Rome *see* Selda Güneş Ceylan, 'Roma Hukuku'nda Kayyımlık (*Cura*) Müessesesine Genel Bir Bakış' (2004) 53 AÜHFD 221-230.

45 and so did the *curator furiosi*; *see* D.3.5.3.5; and the *curator pupillus*, *see* D. 3.5.5.2; D. 3.5.14; also *see* Laurent Waelkens, *Amne adverso: Roman Legal Heritage in European Culture* (Leuven University Press 2015) 245. Waelkens, while reminding that *negotiorum gestio* somehow suggests a coincidental relation, also indicates to the fact that *actio negotiorum gestio* was used for long-term curatorship as well.

46 *Procurator unius rei,* who had to execute a single business was of later creation; see Dictionary of Roman Law (n 27) 654.

47 *Procurator* is different than mandatary in the sense that *procurator -omnim bonorum-* was either appointed under a general authorization or as a *negotiorum gestor* for an absent principal, whereas mandatary was authorized for a certain specific act.

48 Lenel (n 29) 103-196; Kaser, *Private Law* (n 23) 193-194; Zimmerman*, Law of Obligations* (n 4) 437-438; cf Schulz, *Classical Law* (n 23) 621-623.

49 Lenel (n 29) 105. For the claim of interpolation of *absentis* to *alterius* in D. 3, 5, 3, pr., *see* Schulz, ibid 621; cf Rabel, Levy, (n 9) Vol I, I-XX, 39.

cases like 'collecting a debt or purchasing a farm for someone else'[50] is flimsy at best and the notion of 'absence' in cases like 'selling someone else's slave without his knowledge'[51] or 'managing the affairs of a minor'[52] calls for a different interpretation.

During the end of the 3rd century CE, the loss of importance of the distinction between *ius civile* and *ius honorarium* following the end of the formulary procedure resulted in the combination of the actions of *actio in factum* and *actio bonae fidei* which further extended the scope of *negotiorum gestio*.[53] Now *negotiorum gestio* included all juristic relations involving a certain degree of representation except *mandatum* (mandate), *societas* (contract for ordinary partnership) and *tutela* (tutelage).[54]

The *negotiorum gestio* was initially about the 'judicial' protection of an absent citizen by another fellow citizen out of a moral duty and the administration of the affairs of someone else by the time of his death.[55] In time, cases varying from; 'managing a friend's business - administrating the affairs of someone lacking capacity -becoming surety for someone else' to 'performing the obligation of someone else - representing or defending someone else in court' now all fell under the scope of '*negotiorum gestio*' owing to the '*ex bona fide'* wording[56] within its *formula*. Any kind of 'non contractual but obligatory relation' could be the subject of *negotiorum gestio* provided that its prerequisites were met and a specific action (f.e. *actio mandate*, *actio depositum* or *actio tutela*)[57] did not exclude its admissibility. This subsidiary character of *negotiorum gestio* was important as the a*ctio negotiorum gestio* was utilized in certain cases in order to attain a satisfactory outcome where no other procedural remedy was available.[58]

Lastly, during the reign of *Justinian,* who adhered to the distinction between *negotiorum gestorium* and *tutela* and *mandatum*, *negotium gestorium* was classified as a "*quasi-contractus*" together with *condictio indebiti* (unjustified enrichment*)*; *tutela* (tutelage), *communia indicens* (common ownership), and *legatum* (legacy).[59]

50 D. 3.5.5.4; D. 3.5.21; D. 46.3.34.4.

51 D.3.5.40.

52 D. 3.5.5.2. In the cases of *cura furiosi* and managing the affairs of a *pupillus*, it can be argued that the 'absence' of the person is interpreted rather broadly to include the 'absence of full capacity'.

53 Tandoğan, *Vekaletsiz İş Görme* (n 2) 6.

54 Weiss (n 43) 395-396; in Zimmerman's words, "*it began where the mandate ended*" as long as there was no special remedy for the given case; *see* Zimmerman, *Law of Obligations* (n 4) 439-440.

55 D. 3.5.3.pr: "*Ait prateor: 'Si quis negotia alterius (absentis?), siue quis negotias quae cuiusque cum is moritur fuerint, gesserit: iudicium eo nomine dabo*." (The praetor says: "If anyone has managed the affairs of **another (an absent?)** or has administered what were his affairs at the time of his death, I will grant a trial on this account.).

56 *"intentio quidquid ob eam rem dare facere praestare opertet ex fide bona"*

57 *See* D. 3.5.31.1.

58 Theo Mayer-Maly, 'Probleme der Negotiorum Gestio' (1969) 86 (1) ZSS: Romanistische Abteilung, 416, 418.

59 I Ins. 3.27.1-7; also, for the *quasi*-contractual character of *interrogatio iniure* (interrogation before the magistrate), *see* D. 11.1.11.9.

C. Requisities for *Negotiorum Gestio* in Roman Law

In Roman law, *negotiorum gestio* was a source of obligation which was neither a delict nor a contract; it could consist of any kind of -legal or factual- acts and did not require any specific formalities. Furthermore, it can be presented as a legal institution that was quite encompassing and inclusive; f.e there were no restrictions on women for being either the *gestor* or the *dominii* as part of a *negotiorum gestio* relationship.[60] It was also possible for a slave to manage the business of someone else as long as the act of the slave did meet the other criteria for the rise of a *negotiorum gestio*. It followed that if the slave was enriched as a consequence of the *negotium* and the earnings were allocated to the estate of the master then, for demands of compensation, additional praetorian actions (*actiones adiecticiae qualitatis*)[61] could be applicable.[62]

In order to speak of *negotiorum gestio* in Roman law, four different conditions had to be present: 'Managing the business of someone else' being the first, the 'lack of a mandate' being the second, the '*gestor* acting for the interest and according to the will of the principal' being the third and the '*gestor* acting with the expectation for reimbursement' being the fourth:

1. Managing the Business of Someone Else

The first condition for *negotiorum gestio* was that one person managed the 'business of another' (*negotia aliena*). That is, the *gestor* had to act with the intention to manage another's business (*animus aliena negotio gerendi:* the intention to manage another person's business with the intention of benefiting that other person).[63] Accordingly, if the business was managed under the assumption of someone else, but it was actually the intervenor's own business, there would be no *negotiorum gestio* and the intervenor could not resort to the action of *negotiorum gestio*.[64] On the contrary, if the

60 *see* D. 3.5.3.1-3. Owing to the peculiarities of Latin language, a masculine noun or adjective will actually cover both genders and thus, unless otherwise stated, in Roman legal texts what is expressed as 'masculine' includes both men and women; for more on this issue *see* B. Yiğit Sayın, 'Roma'da Kadının Adı: Pagan Roma Kadını üzerine Düşünceler ve Tespitler' in Zeynep Özlem Üskül Engin (ed), *Toplumsal Cinsiyet ve Hukuk* 1 (2nd edn. On İki Levha 2022) 23-24.

61 Depending on the given circumstances either *actio peculio* or *actio de in rem verso.* For example, *see* Paul. Sent. 1.4.5 where it is stated if a son-in-power (*filius familia*) or a slave did manage another's business then the applicable action would be *actio de peculio* since the father (*pater*) or master (*dominus*) would be liable to the extent of the *peculium*. The slave's acts of gaining on behalf of the master was also interpreted as a *negotiorum gestio*; *see* D.11.5.4.1 where Paul states that if a slave -illegally- wins some money from gambling, instead of a noxal action, an *actio de peculium* shall be given against the master because the action arises from *negotiorum gestio*. On the relation between *actio de peculio* and *negotiorum gestio see,* Gökçe Türkoğlu Özdemir, 'Roma Hukukunda Actio de peculio' (2005) 7 (2) Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 103, 126-128.

62 *see* D. 3.5.5.8.

63 Salvatore Riccobono, 'La gestione degli affari e l'azione di arricchimento nel diritto moderno' (1917) 15 (1) Rivista del diritto commerciale e del diritto generale delle obligazioni, 369, 383-384. Riccobone holds that *animus aliena negotio gerendi* was the indispensable element of classical *negotiorum gestio* and Justinian, by abandoning it, expanded the boundaries of '*negotiorum gestio*', Riccobono, ibid 386; *see* also Salvatore Riccobono, *Scritti Diritto Romano*, Vol II (Giuffrè 1964) 1, 7 et seq; For an opposing view *see* Partsch, (n 23) 88 et seq.; also *see* Ernst Rabel, 'Negotium alienum und animus' in *Studi in onore di Pietro Bonfante nel XL anno d'insegnamento* Vol IV (Treves 1930) 279-304, especially 292-295.

64 D. 3.5.5.6. "*Si quis ita simpliciter versatus est, ut suum negotium in suis bonis quasi meum gesserit, nulla ex utroque latere*

gestor was in mistake about the identity of the 'principal' or falsely assumed that he was acting under a mandate (*mandatum*) from the 'principal', he could still make use of *actio negotiorum directa* or could be exposed to the *actio negotiorum contra*.[65] An *actio negotiorum gestio* seems also possible in presence of other types of mistakes on the *gestor*'s part; such as, f.e. errors regarding the number of the '*dominii negotii*' or the nature of the underlying legal cause.[66] As long as the business managed was objectively a '*negotiorum alterius*', a 'mistake' (*error in persona, nomina* or *error in negotio*) did not prevent the rise of a *negotiorum gestio*.[67]

In the case where the *gestor* managed the business of someone else together with his own, thinking that it belonged to 'somebody else' entirely, he would be liable to the principal from the portion of the managed business which belonged to the principal.[68] The same holds true where the *gestor,* in good faith, had managed another's business assuming that it was his own business.[69] Lastly, managing the business of someone else with a purely selfish interest – *sine animus aliena negotio gerendi* - also fell under the scope of *negotiorum gestio* although it is apparent that at first glance an intervention motivated by self-serving goals does not seem to fit into the framework of *negotiorum gestio*.[70] In that regard it must be said that the classicality of the relevant *Digesta* (Digest) texts are highly doubtful, and it is likely that the interpolators' reason for the admittance of *actio negotiorum gestio* in such irregular cases was the lack of a general action of unjustified enrichment during the classical period;[71] therefore, the action of *negotiorum gestio* was inserted instead.[72] On the other hand, during the reign of Justinian, this approach of the interpolators was indeed the norm owing to the belief that it would be unfair to hold the *gestor* who had acted in the interest of *dominus negotii* accountable for the profits he'd made while the one who had managed someone else's business for his own benefit would not be burdened with such an obligation.[73]

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nascitur actio, quia nec fides bona hoc patitur" (If anyone has behaved so foolishly as to transact business of his own to do with his own property thinking it to be mine, no action arises on either side, because good faith does not allow it.)

65 D. 3.5.5.1; D. 3.5.5.pr. In the event of an *actio negotiorum gestio,* the *praetor* would designate the 'real' principal as the '*dominus negotii'*.

66 Özdemir, *Vekaletsiz İş Görme* (n 23) 42-43.

67 Avorel (n 38) 60-61.

68 D. 3.5.5.7; also *see* D. 3.5.39.

69 D. 3.5.48; on the interpretation of D. 3.5.48 *see* Mayer-Maly, Probleme der Negotiorum Gestio (n 58) 417; Seiler, *negotiorum gestio* (n 23) 26 et seq.

70 D. 3. 5. 5. 5: "Again, if anyone has transacted business of mine not for my sake but for his own profit, Labeo has written that he has transacted his own rather than my business (for a man who comes to it in order to rob is after his own profit rather than my advantage) but nevertheless, in fact to a greater extent, will he too be liable to an action for unauthorized administration". For the claim that the text is interpolated; *see* Riccobono, La gestione degli affair (n 63) 383-384; For opposing views *see* Rudolf Moser, *Die Herausgabe des widerrechtlich erzielten Gewinnes, insbesondere unter dem Gesichtspunkt der eigennützigen Geschäftsführung ohne Auftrag* (H.R. Sauerländer & Company 1940) 82-89; also *see* Rabel, Levy (n 9) I-XX, 39-40.

71 Weiss (n 43) 398; Riccobono, La gestione degli affair (n 63) 386.

72 see above I B n 49.

73 *see* Moser, *Die Herausgabe des widerrechtlich erzielten Gewinnes* (n 70) 88-89; Ernst Zimmermann, *Aechte und unächte*

The classical law deemed the *gestor*'s knowledge of the fact that he was managing the business of someone other than himself as sufficient for a *negotiorum gestio* to manifest. It is highly probable that in classical law the intention to manage another's business (*animus aliena negotio gerendi*) was not a specific, isolated condition for *actio negotiorum gestio*; therefore, the fact that *gestor* took care of someone else's business while being aware it was not his own business, was viewed as enough.[74]

The question of whose sphere the business fell was conceptually connected to the nature of the business and when the nature of the business was uncertain, then intention of the *gestor* would be vital in determining who the business belonged to.[75]

The business managed could consist of a single act or be comprised of a series of acts.[76] It could be any 'legal'[77] or 'factual'[78] acting though it was generally understood in terms of 'juristic acts'.[79] On the other hand, the 'management' must had been done by a positive act; refraining from doing an act or breaching an agreement or any other kinds of violations or negative acts would not constitute a *negotium*.[80]

2. Lack of Mandate

A person could be considered 'without a mandate' while managing the business of another if that person had no mandate given by the principal (*dominus negotii*); and was not legally obliged to take care of that person's business;[81] and was not doing it out of a pious or legal duty.[82] In other words, the business must had not been done by virtue of a mandate from the principal, nor in consequence of some legal duty which might be owed to him.[83]

If a mandate had not been given, but the principal knew about the work done and did not object to it, then the provisions of *mandatum* were applied,[84] although it must

negotiorum gestio: ein Beitrag zum römischen Obligationsrecht (J. Ricker 1872) 29.

74 Seiler, *negotiorum gestio* (n 23) 95 et seq.

75 Kaser *Private Law* (n 23) 193.

76 Avorel (n 38) 43. In principle, even the business consisted of more than one transaction, it would result with a single obligation, unless "initially the *gestor* took on only one transaction with the intention of getting out on its completion"; *see* D.3.5.15.

77 f.e. becoming a surety or discharging a debt of someone else; *see* D. 3, 5, 31, pr; D. 3.5.39.

78 f.e. providing support or medicine or repairing a house; *see* D. 3.5.34; D. 3.5.10.1.

79 Zimmerman, *Law of Obligations* (n 4) 440; some types of delicts, were also considered as *negotium*, *see* D. 3.5.5.5.

80 Alberto Burdese*, Manuale di Diritto Privato Romano* (Utet 1966) 575; Avorel (n 38) 42; Seiler, *negotiorum gestio* (n 23) 13. Conversely, in modern law there can be observed some court decisions which invoke *negotiorum gestio* in cases of omission; fe *see,* CA (*Corte d'Appello*/Court of Appeal Italy) Rome 3 May 1983, Temi rom. 1983; *Bank of Scotland v. McLeod Paxton Woolard & Co.* (1998) SLT 258; HR (*Hage Raad*/Supreme Court Netherlands) 10 December 1948, Ned. Jur 1949 no 122, 225.

81 fe if he was not a husband or wife of the person whose business he was managing; *see* D. 3.5.34.1.

82 fe as a parent; *see* D. 3.5.33.

83 See Ernest G. Lorenzen, 'Negotiorum Gestio in Roman and Modern Civil Law' (1928) 13 (2) Cornell Law Review 190, 191-194.

84 D. 17.1.6.2.; though not *ipso iure, see* W.W. Buckland, *A Text-Book of Roman Law* (Cambridge University Press 1963)

be mentioned here that the relevant Digest texts concerning the subject are indeed contradictory.[85] This problem lost its importance in the post-classical period owing to the fact that, during the reign of Justinian, the difference between *consensus* and *ratihabitio* had disappeared paving the way for the acknowledgment of *ratihabitio*'s converting *negotium* to *mandatum*.[86] Furthermore, a duty on the *dominii negotii* to give a *ratihabitio* to the *gestor*'s beneficial acts seem to be accepted later in post-classical law as evident from a text in the *Basilica*, which was a Byzantine codification from the early 10th century.[87] Later, this *domiini*'s duty of r*atihabitio* to *gestor*'s beneficial acts was re-emphasized by the Pandectists.[88]

As mentioned above, the *gestor*'s act which was done under the false belief that a mandate from the principal was granted, would still give rise to a *negotiorum gestio*; so did the act by the *gestor* where the mandate given by the principal was void. Accordingly, in the case where the *gestor* was acting outside of his authority, a *negotiorum gestio* was nonetheless accepted.[89] Furthermore, if a person was acting under the mandate from a third person other than the 'principal', then, as long as the mandatary intended to act not only in behalf of the mandator, but also in behalf of the 'principal', he might had been be a *gestor* with respect to the latter and the rise of a *negotiorum gestio* would had been accepted while any controversy between the *gestor* and the principal would be resolved according to the rules governing *mandatum*.[90]

3. Gestor Acting for the Interest and according to the Will of The Principal

The *negotiorum gestio* might be seen as a Republican anomaly within the individualistic Roman system where altruism was not one of its main pillars. Thus, it is not surprising that the extension of *negotiorum gestio,* which did curb the autonomy of the individual, was restricted with the requirement of *utilas gestionis* (useful management). This *'utilas gestionis* condition' meant that the *gestor* must had acted in the benefit of the principal and only under that condition the *gestor* could have a right of action of *actio negotiorum contraria*.

The *utilitas gestionis* requirement was applied in a casuistic manner without the aid of any specific abstractions or definitions so while some jurists did adopt a narrow

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85 For Ulpian's view that ratification always turns the *negotiorum gestio* into a *mandatum*; *see* D. 50.17. 60; for Scaevola's view which, in such cases, grants the *gestor* an *actio negotiorum gestorum, see* D. 3.5.9.

86 Avorel (n 38) 90.

87 *See* G. Ernst Heimbach (ed), Basilicorum, Vol. II, (Leipzig 1840) XVII. I. IX, 210: "*Quod utiliter gestum est, dominum ratum habere* ***compellitur****, et quod ratum habuerit, valet*" "That which has been done usefully (*utiliter*), the *dominii* is **compelled** to ratify it, and what he has ratified is valid.".

88 Karl Bertzel, 'Der Notgeschäftsführer als Repräsentant des Geschäftsherrn' (1959/1960) 158 Archiv für die civilistische Praxis, 134.

89 D. 3.5.5. pr.

90 Lorenzen (n 83) 193.

view of the requirement of '*utilitas gestionis*',[91] others did interpret it rather broadly.[92] The difference laid in the definition of '*utiliter*' (useful) and its connection with what is 'necessary' (*necessarius*):[93] Should only the 'strictly necessary' expenses be counted as useful and therefore can then be claimed by the *gestor*? Or can any expense, that is not 'strictly necessary' but also not for the 'sake of pleasure' (*causa voluptatis*),[94] be accepted as 'useful' and therefore 'claimable'?[95] The answer seems to lie somewhere in between: from the cases in the texts it can be deducted that while determining whether an expense was useful or not, the standard of 'reasonableness' was applied.[96] The same type of standard was also employed for the 'necessity' of the intervention itself.[97]

A *negotiorum gestio* would be accepted where the principal was not in a position to look after his affairs and there appeared a reasonable expectation that failure to intervene would result in prejudice to the principal. The will of the principal does not seem to account for much in that regard unless the intervenor did act contrary to the express wishes of the principal.[98] In such cases, as to the question whether the *gestor* could demand the expanses borne for the management of a business that was explicitly prohibited by the *dominii* (*prohibenti domino*), there were conflicting ideas on the possibility of reimbursement. Some jurists granted the intervenor an action against the principal to the extent that the expenditure had actually enriched the principal,[99] whereas others rejected to characterize such type of an intervention as a '*negotiorum gestio*' and accordingly denied the action of *negotiorum gestio*.[100] It is apparent that there was not a single, uniform respond in classical law to the problem of '*negotiorum gestio prohibente domini*'. The classical jurists did not resolve the issue in a decisive manner and did give different opinions on separate cases depending

91 *see* fe D.3.5.9.1.

92 *see* fe D.3.5.10.

93 On this *see* Mayer-Maly, Probleme der Negotiorum Gestio (n 58) 423.

94 *see* D. 3.5.26. pr.

95 Useful or not, if the *dominus negotii* gave his permission (*ratihabitio:* ratification) later, then "*ratihabitio mandato comparator*"; (ratification compares to mandate), *see* D. 46.3.12.4. Thus, in such a case, the *dominus négotii* did lose his right to later claim that the expenses were not beneficial. For the claim that in classical law *ratihabitio* did not convert *negotiorum gestio* into a *mandatum, see* Seiler, *negotiorum gestio* (n 23) 71; Partsch (n 23) 120; For an opposing view see Türkan Rado, *Roma Hukuku Dersleri Borçlar Hukuku* (Filiz 2006) 174. For the difference between *ratihabitio* and *consensus* in classical law, *see* Avorel (n 38) 89.

96 "If the *gestor* had not done it, the principal himself should have done it"; *see* Salvatore Di Marzo, *Roma Hukuku*, (Ziya Umur tr, 2nd ed, İÜ Yayınları 1959) 462.

97 The 'reasonableness' of the intervention was to be determined from the principal's point of view; *see* D. 15.3.3.3.

98 fe the principal could have had explicitly prohibited the act or declared his objection to a particular intervenor.

99 *See* D. 3.5.5.5.

100 For the view that the *gestor* could have an *actio negotiorum gestio contra*, *see* Seiler, *negotiorum gestio* (n 23) 29-30, 90-92; also *see* D. 47.2.81.5, C. 2.18.24.1; for the view that the *gestor* might had an *actio negotiorum gestio utilis* (an *actio utilis* in relation to *negotiorum gestio*), see Benedikt Frese, 'Procurator und Negotiorum Gestio im Römischen Recht' in *Mélanges de droit romain dédiés à Georges Cornil* Vol I (Paris 1926) 367; Di Marzo (n 96) 462; also see D. 17.1.40; for the dominant view that the *gestor* would have no recourse against the principal, *see* D. 3.5.7.3, D. 3.5.30.4; D. 11.7.14.13; for a general account of the conflicting views, *see* Avorel (n 38) 99-105; Özdemir, *Vekaletsiz İş Görme* (n 23) 71-75.

on the circumstances of each individual case.[101] Nonetheless, during the Justinian reign, such acts were not considered *negotiorum gestio* as long as the intervenor was informed of the principal's prohibition by a written notice or a notification before witnesses.[102]

The will of the principal was especially important when it did explicitly prohibit the *gestor* from managing the business; however apart from the case where the express prohibition from the principal was disregarded, the principal's wishes and inclinations were not necessary elements of *negotiorum gestio*. In other words, unless it did take the form of an express, explicit prohibition, the will of the principal did not affect the position of the *gestor*.[103] The test of 'reasonableness' could also be employed here, specifically in the context of an 'unreasonable will' of the principal not being considered.

In the case where the *gestor* had disbursed an amount in excess of the express wishes of the principal, the *gestor* could have no recovery for the excessive portion.[104] Accordingly, as mentioned above, where the *gestor* acted against the direct prohibition by the principal, he was liable to the principal.[105] The exceptions of this rule was the case of *actio funeria* and the maintenance/cleaning of public streets. *Actio funerari* was the '*in factum* action' (*actio in factum*) which the praetor granted to a person who did arrange a funeral for someone at his own expense although he was not under any duty to do so.[106] *Actio funeraria* was given against the heir of the deceased person for recovery of expenses and via this action the heir could be held liable on the grounds of his absence or negligence even if he did forbid the burial.[107] *Actio funeraria* was also applicable in cases where the claimant had buried the slave of someone else and then demanded reimbursement of the funeral and burial expenses.[108]

As for the case of cleaning public streets, it was accepted that the tenants could deduct from the rent the expenses they made for keeping the public street outside their accommodations in repair and clean out the open gutters. Since this was a public duty that fall upon every inhabitant; the intention and will of the owner was of no

101 For the strong claim that the classical law actions of *negotiorum gestio prohibente domini* was eliminated by the compilators in order to comply with Justinian's thinking, *see* Seiler, *negotiorum gestio* (n 23) 91.

102 C. 2.18.24. pr-1. It was of no importance whether the business was successfully concluded or not.

103 The principal's wishes might had been contrary to his own interest.

104 D. 3.5.31.4.

105 D. 3.5.7.3.

106 Dictionary of Roman Law (n 27) 343.

107 D. 11. 7. 14. 13; D. 11. 7. 32. pr. For the modern equivalence of the exception of *actio funeria*, *see* the Spanish Civil Code art. 1894. For *actio funeraria* and modern German Law *see* Oliver Unger, *Actio Funeria* (Mohr 2018)| also *see* Erdal Özsunar, 'Forderunspfandung bei der '*Actio Funeraria*' in Murat İnceoğlu (ed), Prof Dr Belgin Erdoğmuş'a Armağan (Der 2011) 197-207.

108 D.11.7.31.1: "*Qui servum alienum vel ancillam spelivit, habet adversus dominum funerariam actionem*." (If someone has buried somebody else's male or female slave, he can have an action for funeral expenses against the owner).

significance.[109] In the event that the owner had forbade the tenant to disburse such expenses, that prohibition would have no effect on the rise of a *negotiorum gestio* against the owner.

On a last note, it did not matter whether the *gestor*'s efforts were in vain or not, provided that the *gestor* had acted in proper diligence. The fact that the intervention had initially yielded favorable consequences but lost its utility afterwards depending on later events, would not prevent the rise of a *negotiorum gestio*.[110] However, the mere belief of the intervenor that his intervention would be beneficial was not enough.[111]

4. *Gestor* Acting with the Expectation for Reimbursement

The *gestor* interfered with someone else's business and acted with the intention of putting the principal (*dominus negotii*) under debt and demanding future expenses. Therefore, if he had acted with the sole purpose of benevolence or liberality or out of respect for family ties,[112] then there would had been no acknowledgment of any *negotiorum gestio;*[113] and the act in question would had been interpreted 'as a donation'.[114] In case of a dispute on the question whether the intervention was done with the expectation of reimbursement or out of the spirit of liberality, the burden of proof lied within the principal.[115] This requirement for the 'intention to be reimbursed' (*animus recepti*) was later given more emphasis by Justinian, under the influence of the East Roman school.[116]

The idea behind a relation that is *negotiorum gestio* is that the intervenor (*gestor*) is acting in the interests of the principal (*dominii negotii*),[117] while having a motive that is gratuitous, but also not purely altruistic. Therefore, the intervenor might had not been interfering with someone else's business targeting a solely personal gain; but he should also had not been interfering out of an altruistic spirit. Whilst the law provided a venue for a display of Roman altruism and the exercise of civic and moral duties; it also did aim to protect the private interests of persons from uncalled intermeddling of third parties.

109 D. 43.10.3.

110 D. 3.5.9.1. "….*ut enim eventum non spectamus, debet utiliter esse coeptum*" (for although we do not regard the outcome, the beginning must be beneficial). Fe as in the case of a wounded slave who might had been treated by the *gestor* and did recover for some time but then later died in relation with his injuries.

111 D. 3.5.9.

112 For the cases where the familial ties incorporate a legal obligation see I C (2) n 81,82.

113 Alan Watson, *The Contract of Mandate in Roman Law* (Clarendon Press 1961) 41-42; Rado (n 95) 149; for the case where a person supported his sister's daughter out of natural affection, *see* D. 3.5.27.1.; for the case where the son fulfilling the debt of his father *see* C. 2.18.12. In both cases, it was hold that there would be no *negotiorum gestio*.

114 Or in better words: as an act having an '*animus donandi'*; *see* C. 2.18.12: "*Si filius pro patre suo debitum solvit, nullam actionem ob eam solutionem habet, sive in potestate patris, cum solveret, fuit, sive sui iuris constitutus donandi animo pecuniam dedit*….." (If a son pays a debt for his father, he has no action concerning this payment, whether he was in his father's power when he paid, or when made *sui iuris,* he paid money with an intention to gift.).

115 Di Marzo (n 96) 462-463; Rado (n 95) 150.

116 Kaser, *Private Law* (n 23) 194.

117 It was possible that the *gestor* was also acting in his own interest in addition to the principal's.

D. Legal Consequences of *Negotiorum Gestio* in Roman Law

1. Rights & Obligations of The Parties

There are two parties in a *negotiorum gestio* relationship. The person whose business is managed in his own interest, that is, the real owner of the business, is the *dominis negotii* (principal), and the person who interferes in someone else's business and manages the business of another without his/her authority is the *negotiorum gestor* (*gestor*).

Negotiorum gestio gave rise to an 'imperfectly bilateral *bona fide* obligatory relationship".[118] The *gestor*'s obligation was to duly complete the *negotium*, and the *dominus negotii'*s obligation was to reimburse the *gestor* for the expenses and losses incurred while performing the work. *Negotiorum gestio* giving rise to 'an imperfectly bilateral obligation' meant that while the *gestor* was always under an obligation, the *dominus negotii* could go under an obligation depending on the circumstances of each given case.[119] It follows that the *actiones* were also bilateral and in correspondence: being *actio negotiorum directa* and *actio negotiorum contraria*.[120]

The main obligation lied with the *gestor*; he was under the obligation to show all attention and care in the management of the business and to finalize the work that he started;[121] even the death of the principal would not have any affect.[122] The *gestor*, who voluntarily intervened with someone else's business, was liable of all his fault (*ex omnis culpa*) although he gained no benefit or profit from the business he managed. Here, the fact that the *gestor* who gains nothing from the *negotiorum* is nonetheless liable *ex omnis culpa* is indeed against the 'utility principle' of Roman law, which adapts the standard of care to the level of benefit gained.[123] The reason for this exception is related to the fiduciary and officious character of '*negotiorum gestio*' as are the other exceptions to the 'principle of utility' such as the *bona fidea* contracts of *depositium* and *mandatum*.[124] The *gestor* had to act as a good *pater* (*diligens pater familias*), that is, he had to act with the least care and diligence that was expected from a Roman *pater*.[125]

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118 Barry Nicholas, *An Introduction to Roman Law* (OUP 1962) 228.

119 Kaser, *Private Law* (n 23) 166.

120 In any imperfectly bilateral obligatory relationship the action against the primary obligor would always be the *'directa*', and the action directed against the 'probable' obligor would be the '*contra'; see* Rado (n 95) 64-65.

121 Buckland (n 84) 538; *see* D. 3.5.20.2 for Paul's view that in the case of the death of the *dominii* (principal), there is no necessity for the *gestor* to enter into new transactions though the *gestor* is required to complete and look after old ones.

122 D. 3.5.3.7.

123 For the utility principle, *see* D. 50.27.13; D: 13.6.5.2,3; also *see* Rado (n 95) 29-30.

124 Rudolph Sohm, The Institutes (James Crawford Ledlie tr, 3rd edn, Clarendon Press, 1907) 368 - 369.

125 Özdemir, *Vekaletsiz İş Görme* (n 23) 65. The *diligens pater familias* was the standard for *culpa levis* (ordinary negligence); for the various degrees of liability in Roman Law, *see* Hilal Zilelioğlu, 'Roma Hukukundaki Sorumluluk Ölçütlerine Genel bir Bakış' (1982-87) 39 (1-4) AÜHFD 241- 264.

The *gestor*'s liability would be considered lighter provided that the work was done to counter an immediate danger (such as fire and flood) or did involve a certain degree of urgency under conditions where there was a serious threat of damage to the *dominii negotii*.[126] In the event of such circumstances, the *gestor* was only liable of his 'intent' (*dolus*),[127] which, since Justinian times, also included gross negligence (*culpa lata*).[128] On the other hand, if the *gestor* had managed the business against the actual or presumptive will of the *dominii negotii* in a way he did not usually do, the *gestor* was also liable of the 'unexpected circumstances' (*casus forti*).[129] Any profit as a result of the business would belong to the *dominii*; if there occurred also losses, then the *dominii* had to set off the profit against the loss.

The *dominii negoti* was not the natural obligor in the relationship of *negotiorum gestio*; he could go under an obligation or not depending on the given set of circumstances. The *dominii negotii* had to assume the liabilities duly incurred and refund the expenses which were necessary and/or useful but were not 'only for the sake of pleasure'.[130] On the other hand, if no expenses were borne by the *gestor* then the *dominii negotii* would not go under any obligation and there could be no action against him. The *gestor* was obliged to give an account to *dominiis negotii* when the business was finished and to transfer the principal all his gains deriving from the managed business.[131]

In conclusion, the institution of *negotiorum gestio* did compel the principal (*dominii negotii*) to assume the obligations which the *gestor* had incurred in his behalf and to indemnify the *gestor* for certain (utilitarian and necessary) expenses borne in the management of the business. One last thing to remember would be the fact that '*actio negotiorum gestio*' was a *bona fide* action and by virtue of the '*ex bona fide'* clause in its *formula* the judge had a wide latitude during his decision making, which naturally would also extend to the determination of the content of the parties' obligations as well the standards of their liabilities.

2. Actions Deriving from *Negotiorum Gestio*

The *negotiorum gestio* would give way to two different actions: *actio negotiorum gestorum directa* and *actio negotiorum contra.*[132] The action that would be directed

126 Rado (n 95) 174.

127 D. 5.3.3.9; also *see* Paul. Sent. 1.4.1; I Ins. 3.27.1.

128 *"Culpa lata dolo aequiparatur"* (gross negligence is equivalent to intent); *see* Paul Koschaker, Kudret Ayiter, *Roma Hususi Hukukunun Ana Hatları* (Seçkin, 1977) 197-198.

129 D. 3.5.10. The specific examples given in the texts are: the *gestor* 'entering into a business deal' for the *dominii* and the 'purchase of newly imported slaves (sing. *novicius*/plr. *novicii*: slaves who very recently lost their freedom) at a sale'.

130 See I C (3).

131 He also had to inform the principal of the work he had undertaken.

132 I Ins. 3.28.1: " *Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum: sed domino quidem rei gestae adversus eum qui gessit* ***directa*** *competit actio, negotiorum autem*

against the *gestor* by the principal would be *actio negotiorum gestorum directa*, as the *gesto*r was -always- the primary obligor. Therefore, it would not be wrong to argue that for the Romans the *actio negotiorum gestorum directa*, which was the action of the principal against the *gestor*, was the 'main action' directing the 'main claim'; and it was the principal (*dominii negotii*) who was the natural *actor* (claimant) and the *gestor,* the natural *reus* (defendant).[133]

The *directa* and *contra* actions of *negotiorum gestorum* were both *bona fidea* actions,[134] (*iudicia bonae fidei*) meaning that the judge (*iudex*) of an *actio negotiorum gestio* would had been vested with a broad authority owing to the *ex fide bona* clause in the *intentio* (statement of claim) of its *formula*.[135] The *ex bona fide* clause granted the judge the authority to decide in accordance with the principles of *bona fides* (good faith) which enabled him to take 'good faith' into consideration while adjudicating a given case.[136] Therefore the judge would have a judicial discretion in deciding on whether f.e the defendant's (*gestor*) acts were in compliance with good faith or not.[137]

The *dominii negotii* had the *actio negotiorum gestio directa* against the *gestor* and by this action could recover what the *gestor* had acquired including any fruits and/or demand monetary compensation since the *gestor* was obliged to give an account to the *dominus negotii* and to hand over to him all that had been acquired once the work undertaken or business managed was finalized.[138] For example, in the cases where the *gestor* did acquire property or similar assets as a result of the managed business and did not transfer them to the *dominii negotii* after the conclusion of the *negotiorum* or did cause damages to the *domiini* while managing his business or did not complete the business, there laid the *actio negotiorum gestio directa* for the *dominii negotii.* Thus, *actio negotiorum gestio directa* was the *dominus*'s safeguard against the *gestor*'s non-fulfilment of such obligations and/or his lack of due diligence. However, unlike the action of mandate -*actio mandate-,* it was not an infaming action meaning that there was no danger for the *gestor* to become *infamis* as a direct consequence of the litigation.[139]

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gestori ***contraria***" (Thus, if one man has managed the business of another during the latter's absence, each can sue the other by the action on *negotiorum gestio*; the **direct action** being available to him whose business was managed, the **contrary action** to him who managed it).

133 On the contrary, in modern law, the *gestor*'s claim against the principal conceived of as *actio negotiorum gestorum contra* by Roman law, seems to be the main core of *negotiorum gestio*; for the modern German case, *see* Samuel J. Stoljar, 'Negotiorum Gestio' in Ernst von Caemmerer, Peter Schlechtriem (eds) International Encyclopedia of Comparative Law, Vol. X (Mohr 1984) 66 et seq; Christian Wollschläger, *Die Geschaftsführung ohne Auftrag Theorie und Rechtsprechung* (Duncker & Humblot 1976) 32.

134 *see* Gai. 4.62; also *see* Kaser, *Private Law* (n 23) 142-143; for the *iudicia stricti iuris* (strict law actions) *see* Metzger (n 11) 230 et seq; Gökçe Türkoğlu Özdemir, 'Roma Medeni Usulünde Formula Yargılaması' (2005) 7 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, 167, 194-196.

135 Erdoğmuş, Tahiroğlu (n 33) 34-35.

136 Gai. 4.47: "*quidquid ob eam rem Numerium Negidium (NN) Aulo Agerio (AA) dare facere oportet ex fide bona* (…. Whatever is required for him to do or to give in accordance with good faith…).

137 or whether a certain set of expenses were beneficiary (*utilitas*) or not.

138 D. 3.5.19.4.

139 *see* Watson, *Law of Obligations* (n 23) 156; Buckland, (n 84) 537; Abdurrahman Savaş, 'Roma ve Türk Hukukunda

The question whether an *animus aliena negotio gerendi* on the *gestor*'s part was required for the *actio negotiorum gestio directa* in classical law is disputable.[140] If the *gestor* managed another one's business without the awareness that it belonged to someone else other than himself, there laid a *negotiorum gestio directa*.[141] And in the case where the *gestor,* knowingly managed someone else's business for his own benefit, an *actio negotiorum gestio directa* was possible for the *gestor* to return the benefits (and -legal/natural- fruits)[142] to *dominus negotii* and to be held accountable for his management in general.[143] The *gestor*, on the other hand, could only claim his expenses in proportion to the enrichment of the *dominus negotii*. Under the Justinian law, however, there was not much controversy, as even in the case where the *gestor* managed someone's else's business solely for his own benefit, Justinian allowed an *actio negotiorum gestio directa* on the grounds of equity.[144]

The *gestor* had the right to direct an *actio negotiorum gestio contra* to the *dominii* (principal) with which he could demand the reimbursement of his expenses,[145] and/or his release of any debts incurred.[146] He did not have the right to ask for the compensation of the damages that had occurred while managing the principal's business though.

As mentioned above,[147] the successful completion of the *negotiorum* on behalf of the *dominii* was not a requirement for the admittance of *actio negotiorum gestio contra*; provided that the intervention of the *gestor* was necessary and done for the benefit of the principal. The refund of the necessary/beneficiary expenses and liabilities could be demanded by the *gestor* via the *contra* action.

II. *Negotiorum Gestio* in Modern Continental Civil Law

A. *Ius Commune* and *Negotiorum Gestio*

Negotiorum gestio had its origin in the intervention for the judicial protection of an absent Roman. Its scope of application extended in time and under the reign of Justinian, *negotiorum gestio* included acts that involved benevolent interventions by third parties regardless of the 'absence' of the principal. Apart from that, it was also used for claims

Vekalet Sözleşmesi' (2000) 8 (1-2) Selçuk Üniversitesi Hukuk Fakültesi Dergisi 598.

140 see I C (1).

141 This requirement of 'awareness' was one of the main aspects which differentiated *negotiorum gestio* from the contract of *mandatum*; *see* Seiler, *negotiorum gestio* (n 23) 54.

142 The technical term *fructus* (fruit/*semere*) includes natural produce of agriculture, off springs of animals and proceeds from mines (hence the term natural fruits), as well as interest and profits gained through legal transactions (legal fruits); *see* Dictionary of Roman Law (n 27) 478; Özcan Karadeniz Çelebican, *Roma Eşya Hukuku* (5th edn, Turhan 2015) 164 -168.

143 D. 3.5.18.4; C. 2.18.18.

144 Di Marzo (n 96) 463.

145 If the *gestor* had no intention to be reimbursed when managing the business of another than there would be no '*negotiorum gestio'* between the parties and there can be no demand for a refund from the *gestor*; see I C (4).

146 Buckland (n 84) 538.

147 See I C (3) n 102.

for restitution where no other action was available and by virtue of this 'complementary' quality, *negotiorum gestio* had found its own place in Justinian's compilations. Thus, with the rediscovery of Roman law in the 12th century,[148] the institution of *negotiorum gestio* enjoyed its second life, this time in the works of the glossators and post glossators and under the influence of Christianity. The chameleon -like character of *negotiorum gestio* had already been established by the time of the Justinian and it was this flexible and inclusive character of *negotiorum gestio* that eased its transition to modern law.

1. *Negotiorum Gestio* in the 'Early *Ius Commune*'

As mentioned above, one of the more prominent aspects of '*negotiorum gestio*' in post-classical law was the growing emphasis on its 'restitutionary function'. In the early '*ius commune*',[149] this function of the *negotiorum gestio* became more pronounced as the rationales of *negotiorum gestio*, being peculiar to Roman social and legal dynamics, was now superseded by the tenet of preventing unjustified enrichment at any cost.[150] The remission of sin and the salvation of soul was only possible with the rebalancing of the equilibrium between things as 'giving everyone their due' and 'avoiding any form of theft' had become the mother of all motives.[151]

The 12th century canonists made extensive use of the ancient Greek philosophical ideas which they combined with Roman law.[152] This combination also enabled the canonists to intertwine concepts taken from Greek philosophy and Roman law, such as 'reason' (*ratio*) and 'equity' (*aequitas*), with theological concepts such as 'conscience', 'forgiveness', 'sin' and 'mercy'.[153] Thus, for the canonists, restitution of unjust enrichment became an element of divine justice;[154] only with restitution could the 'sin'[155] be forgiven.[156]

148 *See* Ziya Umur, *Roma Hukuku – Tarihi Giriş – Kaynaklar - Genel Esaslar* (Fakülteler Matbaası, 1983) 286-288*;* Manlio Bellomo, *The Common Legal Past of Europe* (Lydia G. Cochrane tr, The Catholic University of America Press 1996) 58-63; Charles Radding, Antonio Ciaralli, *Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival* (Brill 2007) 67-69.

149 *Ius commune* is the name given to the uniform system of law which was the result of a long historical process of European legal understanding and in particular of the reception of Roman law. In that regard the term 'early *ius commune'* would denote to the period between the 12th-16th century; *see* Francesco Calasso*, Introduzione al diritto commune* (2nd edn, Giuffre 1951); Nils Jansen, 'Ius commune' in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann (eds), Max Planck Encyclopedia of European Private Law Vol. II (OUP 2012) 1106-1010; Paul Koschaker, *Europa und das römische Recht* (4th edn, Beck 1966); Helmut Coing, 'The Sources and Characteristics of Ius commune' (1986) 19 (3) The Comparative and International Law Journal of Southern Africa, 483-489; Bellomo ibid 55.

150 *see* Wim Decock, *Theologians and Contract Law: The Moral Transformation of the ius commune (ca 1500 – 1650)* (Brill, 2012) 514-519; also *see* Jan Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (GNI, 1996) 20-22, 40-41.

151 *See* Thomas Aquinas, *Summa theologiae* II-II (Peter Schöffer ed, Mainz 1471), Quaest. 62, art. 2

152 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* Vol 1 (Harvard University Press 1983) 146.

153 James Gordley, *Jurists: A Critical History* (OUP 2014) 99-101. On the familiarity of the glossators with Aristotelean principles, *see* Hermann Kantorwicz, *Studies in the Glossators of the Roman Law* (Cambridge University Press 1938) 40-41.

154 *See* Hallebeek (n 150) 53-58.

155 The 'sin' being the seventh commandment of 'not to steal'; *see* Old Testament (Ex. 20:15).

156 Otherwise, there was 'no penance but rather pretence' *see Decretum Gratiani*: C. 14 q. 6 c. 1.

Later, the late scholastics, following Thomas Aquinas, believed that restitution was an act of 'commutative justice' (*iustitia commutative*).[157] And as a matter of commutative justice, a person should be given the opportunity to recover whenever he has been deprived of what belongs to him.[158] Cases of wrongful interference with, and unjustified retention of, someone else's property was conceptualized within the idea of commutative justice.[159] As a consequence, the *negotiorum gestio* was transformed into a highly flexible, yet at the same time unstructured, means of restitution.

The *negotiorum gestio* was now also considered for granting a claim for an enrichment resulting from an unjustified management of another's affairs*;* probably even in cases where the *dominii* protested. For example, the theoretical scope of the *actio negotiorum gestorum utilis (directa)*[160] was extended to provide remedies to the person, who had constructed a building on someone else's land, against the landowner.[161] It did not matter whether the builder was in good faith or bad faith; the 'unjust' ramification that the landowner had been enriched in expense of the builder was what really mattered and had to be remedied somehow. Thus, in the early *ius commune*, the 'Roman law controversy'[162] regarding the essentiality of the *gestor*'s intention to manage the business of someone other than himself seems to be resolved in favour of a solution in line with the Justinian approach, as the *gestor*'s '*animus aliena negotio gerendi*' was no longer seen as a requirement for the norms of *negotiorum gestio* to be applied to either party - be it the *gestor* or the *dominii* -.

2. *Negotiorum Gestio* and the 'Early Natural Law Movement'

Beginning in the 18th century, the nature and the function of *negotiorum gestio* experienced further variations; now it's perception began to be shaped under an 'ideal of help in situations of emergency'.[163] This new paradigm shift had been forced by natural law ideas,[164] which viewed 'contract' to be 'either express or implied by law' and -if implied by law- to be 'either with or without agreement'.[165]

157 *See* Aquinas (n 151) Quaest. 62, art. 1.

158 *See* f.e. Domenicus de Soto, *De iustitia et iure libri decem* (Salamanca, 1553) lib. 4, q. 6, a. 5; Ludovicus de Molina*, De iustitia et iure tractatus* (Venice 1614) disps. 315, 724; Leonard Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (Paris 1628) lib. 2, cap. 12, dubs. 16, 18; §cap. 20, dubs. 10–11.

159 Nils Jansen, 'Die Korrektur grundloser Vermögensverschiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny' (2006) 120 ZSS: Romanistische Abteilung, 106.

160 For the differences (or lack thereof) between *actio negotiorum directa* and *utilis* under the *extra ordinem* system *see* D. 3.5.46.1.

161 By the early glossator Martinus Gossia, *see* Decock (n 150) 515.

162 See I C (3).

163 *See* fe Joseph Kohler, 'Die Menschenhilfe im Privatrecht' (1887) 25 Jherings Jahrbucher für die Dogmatik des bürgerlichen Rechts, 47; Ernst Rabel, 'Ausbau oder Verwischung des Systems? Zwei praktische fragen' (1919) 10 Rheinische Zeitschrift für Zivil und Prozessrecht 89, 94 et seq.

164 The term 'early Natural law movement' indicates to the epoch between 17th -19 century, where the secularization of the legal thinking was achieved which was to be followed by the redesign and realignment of 'law' as a modern concept coupled with the marginalization of its religious basis.

165 Hugo Grotius, *De Iure belli ac pacis*, (Jean Barbeyrac, Janssonio-Waesbergios eds, Amsterdam 1720) II.X.IX.1, 352:

Under this perception, the institution of '*negotiorum gestio*' had to be adapted into the 'theory of contract' and be aligned with the principles that governed contract law.[166] Hence, '*negotiorum gestio*', like the other quasi-contracts, was taken to be a 'presumed contract',[167] implied by law.[168] Another parallel development that eased the acceptance of *negotiorum gestio* by natural law thinking was regarding the limits of property right and the validation of 'someone meeting his own need by means of another's property'.[169]

Thus, since the end of the 18th century, the idea of 'altruistic help in emergency situations' became the new paradigm of *negotiorum gestio* which greatly subordinated, if not eliminated, its restitutionary function.[170] Instead, the issues of remuneration for the *gestor* and his claim for any damages, which were not accepted in Roman law, started to be considered in the context of *negotiorum gestio*.[171] The contractual nature of this new paradigm of *negotiorum gesti*o was formulated with the acknowledgment of the *gestor*'s *animus negotia aliena gerendi*, together with the presumed intent of the *domini*, as the *sine qua* condition.[172] Therefore, the consensual element of *negotiorum gestio* was construed from the fictitious meeting of the *gestor*'s *animus* and the actual or presumptive will of the *domini*. [173]

Conversely, the classical Romans never viewed '*negotiorum gestio*' as having elements of 'tacit consent', 'fictitious agreement', or as being a 'presumed contract';

'. *nam negotiorum gestorum actio ex lege civili nascitur: nullum enim habet eorum fundamentorum ex quibus natura obligationem inducit*.." (..since an action for '*negotiorum gestio*' is born from the civil law and has none of those foundations upon which Nature builds an obligation..). The Enlightenment era codes of Prussia and Austria, which were influenced by natural law ideas, include exclusions of *negotiorum gestio*'s admissibility; *see* the Prussian Allgemeines Landesrecht (1794) §228; ABGB (*Allgemeines bürgerliches Gesetzbuch*) art 1035.

166 Nils Jansen, 'Management of Another's Affairs without a Mandate (Negotiorum Gestio)' in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann (eds), Max Planck Encyclopedia of European Private Law Vol. II (OUP 2012) 1115.

167 Johann Gottlieb Heineccius, Arnoldi Vinnii J.C, *In quatuor libros Institutionum imperialium commentarius academicus, & forensic* Vol 2 (editio novissima, Leyden 1761) 3.28 pr; Johannes de Voet, *Commentarius ad Pandectas* Vol 2, (editio ultima, Leyden 1757) D.44.7.5.

168 There was a dispute over the proposition that '*negotiorum gestio*' did involve tacit consent and thereby could be regarded as a contract, however such an approach was rejected based on Roman law texts; *see* D.2.14.2; D.17.2.4; D.17.1.18; D.17.6.2, D.19.2.13.11. As a result, the approach of 'tacit consent' was abandoned in favor of 'presumed consent'; *see* Birks, Macleod (n 18) 58-77. The claim that there was a 'tacit consent' present in the *negotiorum gestio* rendering it as an 'implied contract' was actually a product of common law jurisprudence, namely of William Blackstone; *see* William Blackstone, *Commentaries on the Law of England* Book III (J.B. Lippincott & Company 1860) 154, 158-166. For a civilian argument as to why '*negotiorum gestio*' could not had been an implied contract, see James Dalrymple Viscount of Stair, The Institutions of the Laws of Scotland (D.M. Walker ed/Tercentenary Edition, Yale University Press 1981); D.2.14.2; D.17.2.4; D.17.1.18, D.17.1.6.2; D.19.2.13.11.

169 Grotius (n 165) II.II.VI-VII, 191-193; Samuel Pufendorf, *De iure naturae et gentium* (editio nova, Knochius 1694) II.VI.5, 314-315; Cf Aquinas (n 151) Quaest. 66, art.7.

170 Jansen, Negotiorum Gestio (n 166) 1115.

171 Zimmerman, *Law of Obligations* (n 4) 444 – 445; also *see* Dutch Civil Code art. 6:200 (2) and the Portuguese Civil Code art. 470, 1158/2.

172 It must be reminded here that the conceptual attachment of *animus negotia aliena gerendi* to *negotiorum gestio* was perceived since the time of glossators; *see* Zimmerman, ibid 440 fn. 60; also see II A (1).

173 E. Ruhftrat,'Beiträge zur Lehre von der Negotiorum Gestio' (1849) 32 (2) Archiv für die civilistische Praxis 173-199, especially 184 et seq*;* 'Einige wichtige Grundsätze der Negotiorum Gestio' (1889) 27 Jhering Jahrbuch, 70-152; For opposing views *see* Robert Joseph Pothier, *Traite des Obligations* 1 (Debure 1764) §114, 136; *Traite du Contrat de Mandat* (Debure 1766) app. *negotiorum gestio.*

on the contrary, it was the lack of consent and a corresponding agreement which differentiated *negotiorum gestio* from all the other contracts;[174] hence the exclusion of '*negotiorum gestio'* from all types of classifications of contracts. The fact that agreement and contract were not conceptually tied to each other in theory had to do more with their Roman way of thinking than their lack of such notions. The concepts and principles used by Aristotle and Thomas had served as luminaries to their own theories and ideologies unlike the Romans who, rather than theorizing philosophical or moral dictums, were more interested in giving opinions on cases by analyzing legal problems much like certain 'jurists of the 19th century'[175] who did disassociate the 'concept of virtue' from their discussions of the essential elements of a contract. The proposition that "every contract required its parties' agreement" was so obvious that there was no specific need to emphasize and no attributable specific legal value to crystallize it.

On the other hand, the contract law of *ius commune,* although being based on Roman law, developed its own principles under the influence of, first, the moral values of Christianity,[176] and then the principles of natural law. It followed that, virtues such as 'communitarian justice', 'equity' and 'equality' were increasingly understood to give the binding force to agreements and in that regard the '*negotiorum gestio'* had to be considered as an expression of such ideals. Later, as mentioned above, during the 19th century such virtues were eliminated from the theory of contract paving the way to its abstraction in terms of 'consent', 'agreement' and the 'expression of will',[177] while, at the same time, the answer to the question of why the will of the parties had to be considered as binding, were continuously ignored.[178]

174 D. 44.7.5.pr.

175 Such as Savigny, Windscheid and Puchta of the Historical School.

176 For the influence of the moral theologians on the development of 'contract law' and its categories *see;* Italo Birocchi, *Causa e categoria generale del contratto, Un problema dogmatico nella cultura privatistica dell'età moderna*. *Il cinquecento* Vol I (Giappichelli, 1997) 203–269; James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press 1991) 69–111; Thomas Duve*,* 'Kanonisches Recht und die Ausbildung allgemeiner Vertragslehren in der Spanischen Spätscholastik' in O. Condorelli, F. Roumy and M. Schmoeckel (eds), *Der Einfluss der Kanonistik auf die Europäische Rechtskultur* (Böhlau 2009) 389–408*;* Klaus Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (J. Schweitzer 1985) 135–148.

177 The French deemed 'contract' to be 'a concord of wills' whilst the German definition was 'a two-sided juristic act (*Rechtsgeschaft*) formed by the declarations of wills (*Willenserklarung*) of both parties'; *see* Charles Demolombe, *Cours de Code Napoleon* Vol XXIV (A. Durand & Hachette 1868) §12, 11; François Laurent, *Principes de droit civil francais* Vol XV (A. Durand, 1875) §423-427, 476-481; Friedrich Carl von Savigny, *System des heutigen Romischen Rechts* Vol III, (Berlin 1840) §134, 258; G. F. Puchta, *Pandekten,* (4th edn, Barth 1844) §49, §54, 70, 79; Bernard Windscheid, *Lehrbuch des Pandektenrechts* Vol I (Frankfurt 1875) §69, 169-170.

178 "*A contract was obligatory simply because it was a contract*", E. Gounot, *Le Principe de I'autonomie de la volonte en droitprive: contribution a Vetude critique de I'individualisme juridiqu*e (Paris, 1912) 129; as quoted by V. Ranouil, *L'Autonomitoe de la volonte: naissance et evolution d'un concept* (Presses universitaires de france, 1980) 72 fn 31. For the criticisms *see* Rudolf von Jhering, *Zweck im Recht*, Vol 1, (3rd edn, Leipzig 1898); Leon Duguit, *Les Transformations generates du Droitprive depuis le Code Napoleon*, (2nd edn, Paris 1920) 72-73, 97-98; Roscoe Pound, 'Liberty of Contract', (1908-09) 18 Yale Law Journal 454-487, especially 457.

The imperative nature and the binding force of a contract was not explained but was taken for granted, giving rise to its definition as the 'consent of the parties'.[179] Accordingly, the rather obligatory conception of *negotiorum gestio* as a 'fictitious contract' did amalgamate it with the category of contractual obligations, albeit in a limited sense. While the *Code Civil* (Code Napoleon) regulated '*negotiorum gestio*' under the title of 'quasi-contracts' following 'contracts', the German Code and Swiss Code included it as separate titles following 'mandate'. It had indeed been more than a century since a codification -other than the French- had included the concept of 'quasi-contracts'. Thus, it would not be wrong to claim that, as of today, the concept of 'quasi-contracts' does belong to the shelves of legal history. Still, that does not change the fact that certain aspects of the modern law of *negotiorum gestio* are still grounded on a given connection to the doctrine of 'quasi-contracts'.[180]

B. *Negotiorum Gestio* in Modern Civil Codes

The Roman *"negotiorum gestio"* is a part of the modern continental civil law as evident by the fact that it had found its place in every code of the civil law jurisdiction. [181] It is however not surprising that while the *negotiorum gestio* of modern laws shows similar features owing to the common Roman origins, it also differs in some respects as regards with its function and requirements.[182] In that regard, the modes of approach adopted in various civil law countries are essentially based on the French, Austrian, German and Swiss Codes by virtue of their original qualities and being models for other codes. Here, one must also remember that in each jurisdiction the content of *negotiorum gestio*, as well as its field of application, is determined by other sources -such as court decisions- along with the legal codes while the consideration of the relation between the law of *negotiorum gestio* and the law of tort and unjustified enrichment in respond to certain issues is also susceptible to different approaches, in different jurisdictions.

179 Gordley, *Philosophical Origins of modern contract doctrine* (n 176) 213.

180 Bar, *Benevolent Intervention* (n 6) 55.

181 *Negotiorum gestio* is also determined as one of the sources for 'non-contractual obligations' within European Union under the framework of the ROME II Regulation (Council Regulation [EC] No 864/2007 on the law applicable to non-contractual obligations), which applies to situations involving a conflict of laws to non-contractual obligations in civil and commercial matters. Accordingly, the article 2 of the regulation provides clarification on what is meant by 'non-contractual obligations': "For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, ***negotiorum gestio*** or *culpa in contrahendo*."; also *see* art. 11.

182 Amongst the modern civil codes only the Portuguese and the Dutch codes do provide definitions of '*negotiorum gestio*' while the Code Napoleon in art. 1372 speaks of "someone who voluntarily manages the affair of another" (….. *volontairement on gère l'affaire d'autrui*…) *see* Bar, *Benevolent Intervention* (n 6) 54. Portuguese CC art. 464: "*Dá-se a gestão de negócios, quando uma pessoa assume a direcção de negócio alheio no interesse e por conta do respectivo dono, sem para tal estar autorizada*." (There is a *gestao de negocios* when, without being authorized to do so, a person assumes the direction of another's business in the interest and for the account of the principal concerned."; Dutch CC art.6:198:" *Zaakwaarneming is het zich willens en wetens en op redelijke grond inlaten met de behartiging van eens anders belang, zonder de bevoegdheid daartoe aan een rechtshandeling of een elders in de wet geregelde rechtsverhouding te ontlenen*" (*Zaakwaarneming* is the intervention in the furtherance of another's interest, willfully and knowingly and with reasonable ground, without deriving the authority to do so from a legal transaction or a legal relationship subsisting elsewhere in the law).

2. German Law and the German Civil Code (BGB)

The German Civil Code (BGB), extensively regulates '*negotiorum gestio*' (*Geschäftsführung ohne Auftrag*) in the special part of the second Book (Law of Obligations), in the middle of the section of 'special contracts' right after the 'contract of mandate'.[183] BGB, whilst not defining the institution of '*negotiorum gestio*', nonetheless provides a definition of the *gestor* as the one 'who takes care of the business of another without being mandated by him or otherwise entitled to do so in relation to him".[184] The Roman influence on the principles governing *negotiorum gestio* in German law is obvious regardless of certain issues where the BGB and/ or the German case law and scholarship had diverged from the Roman approach.[185] In modern German law, as in Roman law, if the management of business has for its object the averting of an imminent danger that threatens the principal, then the *gestor* is responsible only for intent and gross negligence, [186] which is a deviation from the general rule of liability as set in article 276.[187] The threat need not to be 'real', the fact that the *gestor* reasonably and justifiably holds it to be real may be sufficient although it must be said here that the wording of the relevant article of BGB (art 680) does not explicitly address the issue of the 'genuineness' of the threat and the danger it represents.[188] The threat may be directed at the estate or property of the principal however the preservation of his life or limb is also to be considered in terms of *negotiorum gestio* under German law. [189]

On the other hand, if the undertaking of the management of the business is contrary to the 'actual or presumptive will' of the principal, and if the *gestor* must have recognized this, he is bound to compensate the principal for any damage arising from his management of the business, even if no fault is otherwise imputable to him.[190] The

183 BGB art 677 - 687.

184 BGB art 677.

185 Fe *see* BGB art 687/1 which does not admit a *negotiorum gestio* in the case where a person manages the business of another in the belief that it is his own business. Cf D. 3.5.48.

186 BGB art 680; Cf D.3.5.3.9.

187 BGB art 276: "**The obligor is responsible for intention and negligence**, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk…." *English translations of the BGB are taken from the unofficial version on the Federal Ministry of Justice website* (https://www.gesetze-im-internet.de/englisch_bgb/) accessed 30 March 2023.

188 *See* Bettina Limberg et alia (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 6: Schuldrecht - Besonderer Teil III §§ 631-704, Frank L. Schäfer (ed) §§ 677-687 (9th edn, Beck 2023) 680 N.6-7. It is also not clear whether dangers that threaten the relatives of the principal or persons otherwise close to him are to be included; thus, such a qualification -if admitted- needs to be specified. It is only to be followed in the event that the principal is affected by his assets due to a maintenance obligation towards the endangered person and is therefore entitled and obliged under articles 677 et seq; otherwise, the norm of art 680 shall not be applicable, not even analogously, because the foremost requirement of art 677 stated as 'taking care of the business of another" would be missing since, in such a case, there exists no management 'in favor of the principal'. *See* Hans Theodor Soergel (ed), Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen: BGB, Band 10: Schuldrecht 8 §§ 652-704 BGB, Volker Beuthien (ed), (§§ 652-740) (13th edn, Kohlhammer 2012) § 677 N.6.

189 Stoljar (n 133) 160.

190 BGB art 678; compare with D.3.5.3.9; D. 3.5.10.

opposition of the principal is to be disregarded provided that the intervention is of public interest or in cases where failure to act might cause the principal to neglect his statutory duty to furnish maintenance to others.[191]

Under BGB art. 681, the *gestor* is obliged to notify the principal of his intervention as soon as possible and is expected to wait for the principal's decision to the extent that the delay will not prejudice the principal's rights and interests.[192] The *gestor* is also under the duty to give an account to the principal about all types of his activities related to the business, including the rights acquired, the debts incurred, and the measures taken in the course of his intervention.[193]

One of the prerequisites of *negotiorum gestio* in Roman law was 'the *gestor*'s intention to be reimbursed'[194] which we also see as a requirement for *negotiorum gestio* in modern German law.[195] The BGB expects that the act must not be out of a 'pure spirit of liberality',[196] there needs to be an intention to demand reimbursement from the principal.[197] If the management of the business is in the interest of the *dominii* and his actual or presumptive will, the *gestor* can demand his expenses (*Aufwendungen*: outlays)[198] just like a mandatory can.[199] On the other hand, the BGB is silent on the issue of renumeration on the *gestor*'s part and this statutory analogy with mandate (*mandatum*) initially caused some confusion since *mandatum* was initially conceived as an onerous contract in the first draft of BGB,[200] only to be reverted to being a gratuitous contract in the final draft of BGB, as it used to be in Roman law.[201] *Negotiorum gestio*,

191 BGB art 679; compare with D. 3.5.33; D. 3.5.34.1.

192 BGB art 681; the obligation of the *gestor* to notify (*Anzeigepflicht*) is equally accepted in Swiss law despite not being regulated within the Swiss Code of Obligations; *see* Richard Suter, *Echte und Unechte Geschäftsführung ohne Auftrag nach Schweizerischem Obiligationenrecht* (Stampfli, 1933) 43-44; Jörg Schmid, *Die Geschäftsführung ohne Auftrag Art. 419-4224 OR* (3rd edn, Schulthess 1993) N. 453; Urs Lischer, *Die Geschäftsführung ohne Auftrag im schweizerischen Recht* (Helbing & Lichtenhahn 1990) 93; Josef Hofstetter, *Der Auftrag und die Geschäftsführung ohne* Auftrag (2nd edn, Helbing & Lichtenhahn 2000) 26. On the other hand, the failure to comply with the 'obligation to notify' on the *gestor*'s part does not preclude the rise of a *negotiorum gestio* that is 'justified', but rather may give way to the principal's liability for indemnification; *see* Tandoğan, *Vekaletsiz İş Görme* (n 2) 181; J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 2: Recht der Schuldverhältnisse: §§ 677-704, Roland Wittmann (ed), §§ 677-704 (12th edn, Degruyter 1991) §681 N:3; Jauernig Bürgerliches Gesetzbuch: BGB Kommentar, Heinz-Peter Mansel (ed), §§ 652-704 (15th edn, Beck 2018) § 681 N. 1.

193 *See* BGB art 666 which lays down the mandatary's 'duty of information and duty to render account'; also *see* art 681 which states that "the provisions relating to a mandatary in articles 666 to 668 apply to the duties of the voluntary agent (*gestor*) with the necessary modifications".

194 See I C (4).

195 Also *see* Greek Civil Code art 738.

196 Or as the BGB explicitly lays down 'the act shall not be done with the intention to donate (*Schenkungsabsicht*)'. Compare with C. 2.18.12.

197 BGB art 685.

198 On the meaning of *aufwendung* (outlay) in German law and its translation to English, *see* John P. Dawson, 'Negotiorum Gestio: The Altruistic Intermeddler II' (April 1961) 74 (6) Harvard Law Review 1073, 1122-1124.

199 BGB art 683.

200 Zimmerman suggests the reasons behind the conception of *mandatum* as an onerous contract as the 'misinterpretation of Ulpian's D. 17.1.6.pr', 'adherence to old Germanic customs' or the "changed perceptions and practices of modern business life"; *see* Zimmerman *Law of Obligations* (n 4) 420.

201 BGB art 670.

owing to the analogy with *mandatum* also became gratuitous as a result of an editorial oversight.[202] However, this was not the intent of the legislators and in time the confusion seems to be resolved by interpretation. The *gestor* may be allowed by German courts to recover remunerations although this judicial approach does not seem to be adopted unanimously unless the *gestor* has acted in a professional capacity.[203] In determining the amount for which the principal will be liable, the customary rate applicable to the business in question is taken as basis.[204]

As for the claims for outlays, the *gestor* can demand from the principal both his necessary and beneficiary outlays,[205] but the question as to whether the *gestor* may also have a claim for damages is not that easy to answer. And it is once again *negotiorum gestio*'s analogy with *mandatum* which contributes to the confusion here since, as evident from the wording of BGB art. 670, the mandator can only have a claim for the outlays incurred in the course of executing the mandate.[206] Therefore, the mandator's claim for damages could only be realized according to general principles which would require a fault on the part of the debtor. Still, in time, the opinions of modern jurisprudence and the decisions of the German courts did away with the idea of 'fault liability',[207] which, by analogy, also effected *negotiorum gestio.* It follows that, under German law the *gestor* can not only demand his expenses (outlays), but also direct a claim for damages incurred.[208]. The BGB also allows the *gestor* to claim the 'statutory interest' on his outlays.[209]

202 Hans Hermann Seiler, 'Über die Vergütung von Dienstleistungen des Geschaftsführers ohne Auftrag' in Gottfried Baumgärtel, Hans-Jürgen Becker, Ernst Klingmüller, Andreas Wacke (eds), *Festschrift für Heinz Hübner* (Degruyter 1984) 240 -241; Wollschläger (n 133) 313. According to Wollschläger, within the practice of the 19th century there was the widely, if not exclusively, recognized principle of the remuneration for *negotiorum gestio*, which the legislators of the BGB also wanted to follow. However, as a result of changing opinions about the remuneration of the mandate and a failure to check the references, the said confusion came about; for an opposing view see Roland Wittmann, *Begriff und Funktionen der Geschaftsführung ohne Auftrag* (Beck 1981) 28 fn 30.

203 BGH 7 (Federal Court of Justice-Seventh Civil Senate), 7 January 1971, NJW 1971, 609: ("..Because the carrying out of this business constitutes an activity which the plaintiff undertakes within the framework of its business, the plaintiff is entitled to require that the usual remuneration be paid for the performance which it has made…")*;* BGH 7 ((Federal Court of Justice-Seventh Civil Senate) 31 January 1990, BGHZ 111, 308 = NJW 1990, 2524; also *see* Wollschläger, ibid; Helmut Köhler, 'Arbeitsleistungen als `Aufwendungen?' (1985) 40 (8) JuristenZeitung 359, 362; Johann G. Helm, 'Geschäftsführung ohne Auftrag' in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts* III (Bundesanzeiger, 1983) 392-393. Cf Münchener Kommentar § 683 N. 37. On the question of the remuneration of the *gestor* in German law, *see* in general Florian Loyal, *Die "entgeltliche" Geschäftsführung ohne Auftrag* (Mohr, 2011) 10 et seq; for doctors' unsolicited services and their demands for renumeration in German law *see* Karl Larenz, *Lehrbuch des Schuldrechts* (12nd edn, Beck 1981) 355; Jeroen Kortmann, *Altruism in Private Law* (OUP 2005) 110.

204 Schmid (n 192) N.541; Cf Köhler (n 203) 362 et seq.

205 Münchener Kommentar § 683 N.1. Only expenses beyond reasonable discretion are excluded.

206 BGB art 670: "If the mandatary, **for the purpose of performing the mandate**, incurs expenses that he may consider to be necessary in the circumstances, then the mandator is obliged to make reimbursement."

207 Zimmerman, *Law of Obligations* (n 4), 431-432; also *see* Klaus Genius, 'Risikohaftung des Geschaftsherrn', (1973) 173 Archiv für die Civilitsche Praxis 481; Claus-Willhem Canaris, 'Risikohaftung bei schadensgeneigter Tatigkeit im fremden Interesse' (1966) Recht der Arbeit 41-51; Cf Heinrich Honsell, 'Die Risikohaftung des Geschäftsherrn' in Manfred Harder und Georg Thielmann (eds), *De iustitia et iure: Festgabe für Ulrich von Lübtow zum 80. Geburtstag* (Duncker & Humbolt 1980) 495-499.

208 Wollschläger (n 133) 286 et seq; Wittman (n 202) 81 et seq.; Stoljar (n 133) 40-43.

209 BGB art 256.

The principal is expected to reimburse the 'outlays', which are held to be 'beneficiary' and 'necessary' under an objective assessment by taking into consideration the principal's interest and either his actual or presumptive will while, in practice, the principal's interest carries greater weight.[210] The principal is deemed to be benefitting from the intervention provided that the profits accumulated from the business exceeds the expenses and losses incurred.[211]

As for mistakes (*error*) on the part of the *gestor* concerning the identity of the *dominii,* the resolutions of German law are also modelled after Roman law. For example; according to BGB art. 686 if the *gestor* is in error as to the identity of the principal (*dominii*), the actual principal acquires the rights and obligations arising from the management of the business.[212] Also, the managed business shall belong to someone else other than the *gestor*;[213] since, as in Roman law, in the case where the *gestor* manages his own business thinking it belongs to someone else, there would be no *negotiorum gestio*.[214] Furthermore, if the *gestor* manages the business of another in the belief that it is his own, then there would arise no *negotiorum gestio* between the parties,[215] while the *gestor* might be held liable against the principal provided that he knew he was not entitled to manage the business.[216] In such a case of 'non-genuine' intervention (*unechte Geschäftsführung ohne Auftrag*)[217] -where the intervenor is knowingly managing the business of someone else solely for his own benefit-, the principal is vested with all the rights that can be enforced against the intervenor under *negotiorum gestio* whilst the rights of the intervenor are limited to the unjustified enrichment of the principal.[218] In other words, even if there is no *animus negotia aliena gerendi* on the *gestor*'s part, the *gestor* will be treated as if he had acted with *animus negotia aliena gerendi*, therefore being subjected to the same duties as the *gestor* of a genuine intervention (*echte Geschäftsführung ohne Auftrag*). The *gestor* is liable of any damages on the principal and is subject to his demand of 'disgorgement of profits',[219] while, on the other hand, he may only claim the outlays

210 Münchener Kommentar § 683 N.3-4-5. Obviously improper or superfluous measures shall not be considered to be in the interest of the principal and accordingly may not be claimed.

211 Hein Kötz, 'Geschäftsführung ohne Auftrag aus rechtsökonomischer Sicht' in Ulrich Hübner Werner Ebke, Bernhard Grossfeld (eds), *Festschrift für Bernhard Grossfeld zum 65. Geburtstag* (Verlag Recht und Wirtschaft, 1999) 585 et seq.

212 Compare with D. 3.5.5.1.

213 Compare with D. 3.5.5.6

214 *see* BGHZ 75, 203, 205 = NJW 1980, 178; BGH NJW=RR 1989, 1256 et seq.

215 The principal may hold the *gestor* liable with an action of unjustified enrichment and if the *gestor* is in fault for assuming the business as his own, with an action of tort; see Tandoğan, *Vekaletsiz İş Görme* (n 2) 20.

216 BGB art 687/1-2; *Comp.* D. 3.5.6.4. If the principal goes on to assert claims on the basis of *negotiorum gestio*, then he will also assume a duty to the *gesto*r for the return of any enrichment under the provisions of unjustified enrichment.

217 It was Ernst Zimmerman who did come up with the term '*unechte Geschäftsführung ohne Auftrag*' for the case where one person is 'managing the business of another for his own benefit'; *see* Zimmermann (n 73) 27.

218 BGB art 687/2.

219 The 'disgorgement of profits' is different from the 'damages claim' in the fact that the disgorgement of profits aim to restore the benefit gained by an illegal encroachment from an intervenor instead of seeking for compensation for prior losses. For the disgorgement of profits in German law, *see* Tobias Helm, 'Disgorgement of Profits in German Law' in Ewoud Hondius, Andre Janssen (eds) *Disgorgement of Profits: Gain-based remedies throughout the world* (Springer 2015)

incurred in proportion to the enrichment of the principal.[220] The 'disgorgement of profits' includes all the gains by the intervenor as a result of his infringement.[221]

Thus, by virtue of art 687/2, the German Law on '*negotiorum gestio*' seems to acknowledge a dichotomy:[222] namely, the 'genuine intervention in another's affairs', which is held to occur in cases where the *gestor* undertakes to manage a business for the benefit of another; and the 'non-genuine intervention in another's affairs', where the *gestor* manages a business that belongs to someone else, for his own benefit.[223] In order for the intervener to get satisfied under German law, the intervener must have complied with the principal's interest and -actual or presumptive- will regardless of whether he was aware of it or had a reasonable chance of its verification.[224] In the eyes of German law the principal's will is to be taken into account, as unreasonable as it may be. The opposite is also true, that is, the act of the *gestor* may only be beneficiary for the principal to the extent that it conforms with the principal's wishes.[225] However, it is also argued that, on account of BGB art. 684,[226] the fact that the principal's wishes conform with the intervention posteriorly will not cause any effect on the act; meaning that the principal cannot give any permission even if the *gestor* interferes for his own benefit; thus, 'giving permission' is limited only to the cases where the business is undertaken with the intention of serving the interest of the principal, but in actuality is not in accordance with the principal's purpose or his interest -which is to determined objectively-.[227]

220-230; Helm, while pointing out that 'disgorgement of profits' is explicitly laid down in articles 687/2 in connection with articles of 681 and 667 of the German Civil Code (BGB), also asserts that art. 687/2 is not particularly relevant in practice partly owing to the prevailing opinion that it does not apply to intentional breaches of contract and partly to the fact that the "most important instance where it might apply is already covered by other, more specific claims". For 'disgorgement of profits' in Turkish Law, *see* Başak Başoğlu, 'Non-genuine Benevolent Intervention in Another's Affairs and Disgorgement of Profits Under Turkish Law' in Ewoud Hondius, Andre Janssen (eds), *Disgorgement of Profits Gain-Based Remedies throughout the World* (Springer, 2015) 253-265.

220 *Compare with* D. 3. 5. 5. 5.

221 E.g., proceeds from a production infringing someone else's patent; *see* Helm (n 219) 219.

222 The same distinction is also observed in Turkish-Swiss Law; *see* III B.

223 The German scholarship further considers the 'genuine intervention in another's affair' in two separate categories: as being 'justified' vs 'unjustified', with the 'justified genuine intervention' meaning to manage the business of the principal that is mandatory, and/or in the interest of the principal and not prohibited by him whereas 'unjustified genuine intervention' occurs when the intervenor manages a business that is either not in the interest of the principal or is prohibited by him. The 'unjustified genuine intervention' is burdened with the same duties as the justified intervener; *see* BGB art 681/1-2; art. 667; also *see* Andreas Bergmann, Dieter Reuter, Olaf Werner, Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2 Recht der Schuldverhaltnisse §§ 677-704 (Gruyter 2015) 90-95; Bar, *Benevolent Intervention* (n 6) 63; for opposing views *see* Wollschläger (n 133) 46-47; Helm (n 203) 366.

224 Staudinger/Bergmann (n 223) § 683 N. 1 30.

225 BGHZ 138, 281, 287; Bergmann, § 683(30); Mansel/Jauernig (n 192) § 683 (5); also *see* Werner Schubert (ed), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Recht der Schuldverhältnisse* 2 (Gruyter, 1980) 975.

226 BGB art. 684: "If the requirements of section 683 do not apply, then the principal is obliged to return everything that he obtains as a result of the voluntary agency under the provisions on the return of unjust enrichment. If the principal ratifies the agency, then the voluntary agent is entitled to the claim specified in section 683.".

227 Hans C. Nipperdey, Julius von Staudingers Kommentar zum BGB, II Bd 3 Teil (10th edn, Berlin 1943) § 684, N. 9; Ludwig Enneccerus, Heinrich Lehmann, *Lehrbuch des Bürgerlichen Rechts* II (14th edn, Mohr, 1954) 683.

In the cases where an actual will is not present and/or a presumptive will is not ascertainable on the principal's part, then the objective utility of the intervention determines its legitimacy;[228] to put it into other words: the actual 'utility' of the act corresponds fictitiously to the presumed will of the principal.

The BGB is one of the few codes, along with the Swiss and Turkish codes,[229] that incorporates the question of the lack of capacity on the part of the voluntary agent,[230] which is yet another indication to the fact that it is the indeed the German law where the legal framework of '*negotiorum gestio*' is constructed in the strongest sense.[231] The extensive admission of *negotiorum gestio* by the German law is evident from both its scope of application and the frequency of its employment by the courts. [232] The BGB contains references to *negotiorum gestio* as part of issues of property law,[233] lease[234] and inheritance law.[235] And, notwithstanding that some issues which used to fall under the category of '*negotiorum gestio*' is now addressed with novel, specialized remedies,[236] new types of cases continue to be absorbed into the institution of '*negotiorum gestio'* such as the case of the self-sacrifice of a motorcyclist for evading a crash with a pedestrian (or a cyclist).[237]

2. French Law and the French Civil Code (*Code Civil*)

The *Code Civil* (Napoleonic Code), which was drafted nearly a century before BGB,[238] had regulated *negotiorum gestio* (*gestion d'affaires*) as part of its third Book ("Of the different manners by which one acquires property"), and more specifically in its First Chapter ("Of quasi-contracts") of the Fourth Title (extra-contractual obligations), between articles of 1372 and 1375. The Code Civil had undergone an

228 BGHZ 47, 370, 374; BGH NJW-RR 1989, 970; Bergmann, § 683 (31).

229 *See* Swiss Code of Obligations (*Obligationenrecht*/OR) art. 421, Turkish Code of Obligations (*Türk Borçlar Kanunu*/TBK) art 528. The other codes are the Greek Civil Code (*see* art 735), which was largely influenced by the German Civil Code, and the Italian Civil Code (*see* art 2029).

230 BGB art 682: "If the voluntary agent lacks capacity to contract or is limited in his capacity to contract, then he is only responsible under the provisions on damages for torts and on the return of unjust enrichment."

231 The BGB is also the only code -along with the Estonian Civil Code- which regulates the mistake of the intervener about the identity of the principal**;** see II B (1).

232 Bar, *Benevolent Intervention* (n 6) 73.

233 BGB 994/2.

234 *See* fe BGB art 539/1 for the rule that 'the lessee may, under the provisions on agency without specific authorization, demand reimbursement from the lessor for outlays on the leased property'; also *see* art. 581/2; for usufructuary lease *see* BGB art 581/1.

235 *See* BGB 1959/1, 1978/1-3.

236 Fe the issue of the right of recourse of a person who had paid someone else's debt is resolved today via a *cessiones legis* (assignment by operation of law) and similar devices instead of *negotiorum gestio*, *see* Zimmerman, *Law of Obligations* (n 4) 447.

237 Christian Von Bar, *The Common European Law of Torts*, Vol. 1 (Clarendon Press 1998) No. 514. For the actual case where a motorcar driver who did crash into a tree in order to evade collusion with a child, was awarded a 'reasonable' compensation *see* BGHZ 38, 270 et seq; for the criticisms *see* Wollschläger (n 133) 305 et seq; Zimmerman ibid (n 4) 444; also *see* Rainer Frank, 'Die Selbstaufopferung des Kraftfahrers im Straßenverkehr' (1982) 37/21 Juristenzeitung 737-744.

238 In 1804. For a general information regarding the *Code Civil* (Napoleonic Code) *see*, The Code Napoleon, The (1855) 3 (11) American Law Register 641-650.

extensive amendment via Ordinance nº 2016-131 dated 10 February 2016 whilst the norms on *negotiorum gestio*, now regulated within the sections of article 1301, virtually remained unchanged.[239] Furthermore, the use of the term "quasi-contract', which was the subject of recurring criticisms from the French jurisprudence,[240] also remained in existence following the 2016 amendment.

Notwithstanding some minor variances, the regulation of *gestion d'affaires* within the *Code Civil* shows many commonalities with the German *Geschäftsführung ohne Auftrag*.[241] The one major point of divergence is on the French law's admittance of the so-called "justified *negotiorum gestio*" as the only legitimate type of *negotiorum gestio*. Thus, the French law, unlike the German law, does exclude both 'the unjustified intervention which lacks reasonable grounds' and 'the intervention of a person in another's business for his own benefit' from its concept of *negotiorum gestio*.[242] Therefore, the actions of an intervenor acting 'unjustifiably' or 'solely for his own benefit' -*sine animus gerende*- falls outside the scope of *negotiorum gestio* -as long as they are not later ratified-;[243] and the intervenor can be held liable under the provisions of the law of delicts or unjustified enrichment, provided that relevant conditions are met.[244] The presence of '*animus gerende*' on the *gestor*'s part is determined in connection with the 'necessity' and 'utility' of the intervention; as long as the *gestor* is aware that his act is beneficial to another, he is not presumed to have an intent of acting 'solely for his own interest'.[245]

Accordingly, a claim for reimbursement will be considered provided the intervention was beneficial for the principal while, in that regard, urgency is generally not required.[246] Additionally, the *gestor*'s acts must both comply with the principal's objective interest and his subjective wishes.[247] The *gestor* has a right to demand reimbursement of his expenditures borne in the interest of the principal as well as indemnification in respect of obligations which he has incurred in the principal's interest. The principal is also under the duty to compensate the *gestor*

239 For a detailed account of the 2016 amendment of the French Civil Code *see* John Cartwright, Simon Whittaker (eds), The Code Napoléon rewritten: French contract law after the 2016 reforms (Hart 2020); Jan Smits, Caroline Calomme, 'The Reform of the French Law of Obligations: Les Jeux Sont Faits' (2016) 23 (6) Maastricht Journal of European and Comparative Law 1040-1050.

240 *See* fe Gabriel Baudry-Lacantinerie, Louis Barde, *Traité théorique et pratique de droit civil: des Obligations* III (2nd edn, L. Larose 1905) 1040-1041; Paul Frederic Girard, *Manuel Elementaire de Droit Romano* (6th edn, Rousseau 1918) 398-399; Georges Bry, *Principes de Droit Romana* (5th edn, Sirey 1927) 459.

241 Harald Müller, *Der Fremdgeschäftsführungswille: eine kritische Bestandsaufnahme* (Mannheim Unv 1980) 152 et seq; Tandoğan, *Vekaletsiz İş Görme* (n 2) 13-16.

242 Bar, *Benevolent Intervention* (n 6) 61; also *see* Code Civil art 1301, 1301/5.

243 See Code Civil art 1301/3. Cf BGB 684.

244 Tandoğan, *Vekaletsiz İş Görme* (n 2), 19; also *see* Code Civil art 1301/5.

245 Maurice Picard, 'La gestion d'affaires dans la jurisprudence contemporaine' (1921) 20 Revue Trimestrielle de droit Civil 23-32; also *see* Code Civil art 1301/4; Baudry-Lacantinerie, Barde (n 240) 1045.

246 Jacques Flour, Jean-Luc Aubert, Eric Savaux *Droit civil; les obligations; le fait juridique* (10th edn, Dalloz 2003) n. 12-13.

247 Tim W. Dornis, 'The Doctrines of Contract and Negotiorum Gestio in European Private Law: Quest for Structure in a No Man's Land of Legal Reasoning,' (2015) 23 Restitution Law Review 79.

for any harm which he has suffered as a consequence of the management of the principal's business.[248]

Another difference that can be observed between the statutory regulations in the German and French Codes is the recognition of the 'duty to continue the intervention'. Whilst the BGB does not refer to such a duty in its textual wording,[249] the French Code explicitly lays down the *gestor*'s duty to continue his management of another's affairs until the principal[250] is able to take care of his affairs himself.[251] If the *gestor*'s fails to fulfill his 'duty to continue the intervention', then he will be liable towards the principal unless a force majeure had prevented him to continue or his continuation of the intervention entertains the risk of a serious personal loss.[252]

The standard of care of the *gestor* is what the Roman law expected from 'a good pater' (*diligentia boni patris familias*) -now reasonable person-, which is the type of prudent administration envisioned for 'reasonable' persons.[253] However, such a standard of care is not absolute, and the French courts do have the authority to lessen this duty of care in regard with the circumstances of the given case.[254]

All in all, the confirmation of the social interest in encouraging everyone to help others outweighs other certain considerations in French law and accordingly, it is accepted that the *gesto*r can claim expenses not only for the intervention that are necessary for the interests of the principal but also for the ones that are only beneficial for the *gestor*.[255] And although the *gestor*'s demands for renumeration does not constitute an essential element of his entitlement, his loss of time might be treated as recoverable expenses.[256]

3. Austrian Law and the Austrian Civil Code (ABGB)

The Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*/ABGB), which was officially published on 1 June 1811 and was in force by 1 January 1812, dates from

248 Code Civil art 1301/2.

249 For the view that rejects of such a duty in German law, *see* Benjamin Schmidt, *Die berechtigte Geschäftsführung ohne Auftrag: Eine Untersuchung der Voraussetzungen des gesetzlichen Schuldverhältnisses der §§ 677 ff. BGB* (Duncker & Humblot 2008) N. 439 et seq; Michael Martinek, Uwe Theobald, 'Grundfälle zum Recht der Geschäftsführung ohne Auftrag, 1. Teil: Die Grundstrukturen der Geschäftsführung ohne Auftrag' (1997) 7 Juristische Schulung 617; Loyal (n 203) 110-111.

250 or in the case of his death, his heir; compare with D. 3.5.3.7.

251 Code Civil art 1301/1.

252 Marcel Planiol, Georges Ripert, *Traité pratique de droit civil français* Vol 7 (2nd edn, Durand 1954) no. 730.

253 Code Civil art 1374/1. The term of "as a good father" had been removed from French law with the No. 2014 - 873 law on "Substantive Equality between Women and Men" (*LOI n° 2014 - 873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*) and been replaced with 'reasonable/reasonably'(*raisonnables*/*raisonnablement*).

254 Code Civil art 1374/2; also *see* fe Civ. 16.11.1955 J.C.P. (*Juris-classeur periodique*) 1956.II.9087.

255 Tandoğan, *Vekaletsiz İş Görme* (n 2) 15.

256 F.H. Lawson, A.E. Anton, L. Neville Brown, *Amos & Walton's Introduction to French Law* (3rd edn, Clarendon 1967) 194.

the same period as the Napoleonic Code. As mentioned above,[257] the ABGB, being a product of the age of enlightenment, was deeply influenced by natural law ideas.[258] Thus, it is expected that the institution of *negotiorum gestio*, which is basically the intermeddling in another's affairs, had been regulated in a rather restrictive manner within the ABGB.[259] Provisions on *negotiorum gestio* are placed in the second Part ("Of the law of patrimony"), Second Division ("Of the personal patrimonial rights") and the 22nd Chapter ("Of agency and other modes of management"). References to *negotiorum gestio* within Austrian civil law is also observed as part of 'law of property;[260] and matters of lease.[261]

Under Austrian law, *negotiorum gestio* is 'justified' only in the case of providing 'emergency aid'; in principle, all types of other interventions are either 'unjustified' or subjects of the law of unjustified enrichment – or law of torts if the circumstances call for it-.[262] If the intervention by the *gestor* is deemed to be exceptionally 'beneficial' to the principal then a *negotiorum gestio* is admitted, albeit an 'unjustified' one. The ABGB considers the 'unjustified *negotiorum gestio*' solely from the standpoints of 'liability for damages' and 'reimbursement of expenditures'.[263] The *gestor* is responsible for all the consequences of his acts which are not necessary and do not confer a superior benefit to the principal. There is no explicit rule within the ABGB that disqualifies or mitigates the liability of the *gestor* who intervenes in case of necessity.[264]

Thus, the *gestor* can demand indemnification where his intervention amounts to rescuing another from emergency or where his intervention is predominantly beneficial for the principal.[265] The elements of 'necessity' and 'utility' is determined from the principal's perspective,[266] whereas the *gestor*'s concurrent self-interest is generally not a bar to indemnification unless he has acted solely in his own interest.[267] However, in cases where an 'urgent necessity' is lacking, the claim to reimbursement of expenditure may depend on whether the intervention was in the end successful or not.[268]

257 See II A (2) n 165.

258 See fe ABGB art 16 which, more than 200 years ago, defined the modern understanding of 'human dignity' while, at the same time, prohibiting slavery and serfdom.

259 Ernst Swoboda, *Bereicherung, Geschäftsführung ohne Auftrag, versio in rem nach österreichischem Recht, mit. Ausblicken in das deutsche Recht* (Leuschner & Lubensky, 1919) 52 et seq.

260 *See* ABGB art 336, 392.

261 See ABGB art 1097.

262 *See* OGH (Supreme Court of Justice) 4 December 1968, JBl 1969, 272; confirmed by OGH 18 March 1997, SZ 70/48.

263 Bar, *Benevolent Intervention* (n 6) 60; Franz-Stefan Meissel, *Geschäftsführung ohne Auftrag – zwischen Quasikontrakt und aufgedrängter Bereicherung* – (Manz 1993) 110 et seq.

264 Compare with D.3.5.3.9, BGB art 680 and the Swiss Code of Obligations (*Obligationenrecht*/OR) art 420/3.

265 ABGB art 1036-1037.

266 As it is the case in German, French and Swiss laws. For an Austrian Supreme Court of Justice (OGH) decision concerning *negotiorum gestio* with a reference to BGB art. 677, *see* Austrian OGH 106 JBl 256, 257 (1984) (decision of 21 April 1982)

267 Austrian OGH RdW 2003, 259, 261 (decision of 18 July 2002); Meissel (n 263) 66-67; Peter Apathy et al (eds), ABGB (4th edn, LexisNexis 2014) § 1035(5).

268 ABGB art 1037.

In cases of emergency there is an assumption that if the specific circumstances had been known to the principal, he would have approved the management, which legitimizes the rise of an obligatory tie between the *gestor* and the principal. The danger must be real in a concrete sense, the *gestor*'s point of view and any presumption on his part is immaterial. The *gestor* might only demand the reimbursement of the expenses which were essential in the aversion of the danger. The outcome of the *gestor*'s intervention is not relevant in that regard as long as he did exercise due diligence.[269]

4. Swiss Law and the Swiss Code of Obligations (OR)

The influence of Roman law and the *ius commune* on the Swiss law of *negotiorum gestio* is fully felt in terms of both the obsolete 'Swiss Code of Obligations of 1881'[270] and the current 'in force' version of 1912.[271] The Swiss Code of Obligations (*Obligationenrecht*: OR) is the 5th part of the Swiss Civil Code *(Schweizerisches Zivilgesetzbuch*/ZGB) and entered into force on 1 January 1912, together with the ZGB. The provisions on *negotiorum gestio* in Swiss law can be found within the OR between articles 419-424.[272] The rights and obligations of the *gestor* is regulated between articles 419-422, while the position of the principal is addressed between articles 422-424.[273]

Swiss OR art 419 contains the basic norm on *negotiorum gestio*, which burdens the *gestor* with the duty to manage the business he undertakes in accordance with the interests of the principal and in compliance with his assumed will. Any person who conducts the business of another 'without authorization' is obliged to do so in accordance with his best interests and presumed intention; while 'without authorization' does correspond to the lack of any contractual or statutory duty on the *gestor*'s part.[274] The lack of a duty - be it contractual or statutory - on the *gestor*'s

269 Lorenzen (n 83) 119.

270 The 1881 Swiss Code of Obligations was influenced by the Dresdner Draft and in return influenced the draft of the German Civil Code which would be adapted in 1885 and become effective by 1900. Swiss law has generally been considered to belong to the Germanic tradition. For more on this issue *see* Pascal Pichonnaz, 'Switzerland' in Jan Smits (ed), Elgar Encyclopedia of Comparative Law (2nd edn, Elgar 2012) 852-859; M. Walter Young, 'Eugene Huber ve İsviçre Medeni Kanununun Ruhu', Jale Güral (tr) (1949) 6 AÜHFD 162-180; Ivy Williams, *The Sources of Law in the Swiss Civil Code* (OUP 1923).

271 In the draft Swiss Code of Obligations (2020) the 'genuine and justified *negotiorum gestio'*, is considered to be one of the 'sources of obligation'; *see* the Draft Swiss Code of Obligations (2020) art 74-78; for the Draft Swiss Code of Obligations (2020) *see* Claire Huguenin, Reto Hilty (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil = Code des obligations suisse 2020* ((Schulthess 2013). The draft acknowledges 'genuine and justified *negotiorum gestio'* as the only legitimate one and subjects the other types to the provisions of 'unjustified enrichment' and 'torts', thereby restricting the scope of the application of '*negotiorum gestio*'.

272 Also *see* the Zurich Civil Code (1853-1855) art 1206-1215.

273 Since the Turkish Civil Code (*Türk Kanuni Medenisi*) and the Code of Obligations (*Borçlar Kanunu*) were recepted -or rather translated- from the Swiss law and the current state of '*negotiorum gestio*' under Turkish law will be considered separately in the next chapter, we restrict ourselves in this section to merely laying down the main aspects of *negotiorum gestio* within the Swiss Code of Obligations.

274 Claire Huguenin, Obligationenrecht – Allgemeiner und Besonderer Teil, (Schultess 2014) N. 1613; also *see* Heinrich Honsell, Nedim Peter Vogt, Wolfgang Wiegand (eds), Basler Kommentar zum Schweizerischen Privatrecht,

part might not be sufficient though unless the *gestor* is also aware of his lack of duty himself. Whereas the Swiss academia seems to be unanimously critical of such a qualification,[275] there are indeed 'two Federal Court decisions'[276] where the *gestor*'s awareness of his 'lack of authority' is deemed to be a prerequisite for the rise of a '*negotiorum gestio*'.[277]

Under Swiss law, as in Roman law, the *gestor* is under an *omnis culpa* liability which may decrease or increase subject to circumstances:[278] If the *gestor* has acted in order to avert imminent damage to the principal then his liability is to be judged more leniently, however if he acted against the express or otherwise recognizable will of the principal, then his liability will increase making him liable of unexpected circumstances.[279]

The Swiss Code of Obligations do acknowledge the division between 'genuine' and the 'non-genuine' *negotiorum gestio* as evident by the wordings of articles 422 and 423.[280] The gestor's claim under an action of 'genuine *negotiorum gestio*' is dependent on his acting in the principal's interest.[281] Additionally, the *gestor*'s acts must both

Obligationenrecht I, Art.1-529 OR, Rolf H Weber, Geschäftsführung ohne Auftrag: Art. 419-424 (6th edn, Helbing & Lichtenhahn 2015) §419 N.7. In the event that the *gestor* is authorized by a third person other than the principal, there seems to be a controversy on whether '*negotiorum gestio*' shall be applicable in such cases; for the view that gives the *gestor* the alternatives of either resorting to the third person via the actions of unjustified enrichment or to the principal via the *negotiorum gestio contra, see* Bruno von Büren, *Schweizerisches Obligationenrecht Besonderer Teil (Art. 184-551*) (Schulthess, 1972) 332; Cf Hermann Alfred Hagenbüchli, *Die Ansprüche des Geschäftsführers ohne Auftrag und ihre Voraussetzungen* (Diss. Univ. Zürich. 95 S.8, Davos, 1926) 50-51 for the rejection of the applicability of *negotiorum gestio* in those cases.

275 Fe see Hagenbüchli (n 274) 51; Suter (n 192) 20; Lischer, (n 192) 35; Claire Huguenin, Christine Chappuis, 'Schweizer Obligationenrecht 2020 Art 73-78' in Claire Huguenin, Reto M. Hilty (eds), *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil* (Schulthess 2013) Art 74, N. 3.

276 *see* BGE (*Bundesgerichtsentscheid*/Swiss Federal court decision)75 II 225 (1949) for the decision where the Federal Court hold that in order for a '*negotiorum gestio*' to rise, it is necessary for the *gestor* to know that he is managing the business of another while having no valid authority to do so (" *Just as business management implies the awareness of managing the affairs of others, it also presupposes that the "manager" knows that he does not have a mandate for this purpose*); and BGE 99 II 131 (1973) for the decision where the Federal Court maintains that a specific will targeting 'to manage the business of another without having any authority' is required for a valid *negotiorum gestio*. For an account of the decisions and their criticisms, *see* Hüseyin Can Aksoy, 'Vekaletsiz İş Görende İşi Vekaletsiz Olarak Görme Bilinci Aranmalı mıdır?' (2017) 75 Ankara Barosu Dergisi 91, 110-114.

277 For a similar understanding in Turkish law, *see* the dissenting opinion in the Court of Cassation's Decision on the Unification of Judgments (*Yargıtay İçtihadi Birleştirme Kararı*) E. 1958/15, K. 1958/7, T. 4.6.1958: "*Borçlar Kanununun vekaleti olmadan başkası hesabına tasarrufta iş yapan iş sahibi hesabına işi yaptığını bilmeli ve bu sıfatla hareket etmelidir*…" (…In the 'management of another's affair' within the Code Of Obligation the one who manages the business of someone else without authority shall be aware that he is managing the business on behalf of the principal and accordingly shall act in this capacity…)

278 OR art 420.

279 OR art 420/2-3.

280 Jolanta Kren Kostkiewicz, Stephen Wolf, Marc Amstutz, Roland Fankhauser (eds) OR Kommentar: Schweizer Obligationenrecht, Roger Rudolph §§ 419-424 (ed), (3rd edn, Orell Füssli 2016) Art. 419, 1165 et seq; Kurt Aeby, *Die Geschäftsführung ohne Auftrag nach Schweizerischem Recht*, (Universitat Zurich 1928) 37. For the academic sub-divison (good faith, non-genuine intervention vs bad faith, non-genuine intervention) of the 'modern *negotiorum gestio'* within Swiss jurisprudence, *see* Schmid (n 192) N. 9-10; Weber (n 274) Art 419(2); Eva Maissen, Claire Huguenin, Reto M. Jenny (eds.), Claire Huguenin, Markus Müller-Chen, Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 2: Art. 319-529 OR (3rd edn, Schulthess 2016) Art. 419 (2-4).; for the Turkish jurisprudence *see* Fikret Eren, *Borçlar Hukuku Özel Hükümler*, (4th edn, Yetkin 2017) 843-844; Azra Arkan Akbıyık, *Gerçek Olmayan Vekaletsiz İş Görme* (Alfa 1999) 15-16; Ümmühan Kaya, *Vekaletsiz İş Görme* (Yetkin 2020) 39-49. Also *see* III B (1).

281 BGE 86 II 18, 25 (decision of 19 January 1960); Schmid (n 192) N. 68. The intervention might also be beneficial for

comply with the principal's 'objective interest' and 'subjective will';[282] and if the will is not ascertainable -either explicitly or implicitly- then both the presumptive will and the objective utility of the act will be considered jointly.[283] The ratification by the principal turns the *negotiorum gestio* into mandate and accordingly, the provisions of mandate apply retrospectively.[284]

On the other hand, if the *gestor* had the opportunity to inquire about the actual will of the principal but refrained from doing so, then he will not be able to resort to the provisions *of negotiorum gestio*.[285] It is indeed imperative that the *gestor* consults with the principal prior to his intervention and the only exception seems to be the case where the principal is unreachable.[286] Thus, it is, basically, the principal's individual will and his subjective preferences that determine the legitimacy of the *negotiorum gestio* and whether the *gestor* will eventually be reimbursed or not. [287]

III. *Negotiorum Gestio* in Turkish Civil Law

A. Negotiorum Gestio in the Turkish Code of Obligations

The modern Turkish Republic is a civil law country whose 'private law system'[288] is mostly based on Roman law by virtue of the reception of Swiss Civil law during the early, formative years of the Republic.[289] Thus, it is not surprising that the institution of '*negotiorum gestio*' had found a place in the 'abolished' 818 numbered Code of Obligations (BK): as part of the Second Division 'Various Types of Contract' (*Akdin*

the *gestor* himself; as long as the intervention benefits the principal, the fact that the *gestor* is also benefitting from his own intervention does not prevent the rise of a *negotiorum gestio*; *see* Huguenin (n 274) N. 1620; Hugo Oser, Willhelm Schönenberger, Kommentar zum Schweizerishen Zivilgesetzbuch, V. Band: Das Obligationenrecht, 3. Teil: Art. 419-529 (2nd edn, Schultheß & Co 1945) Art. 419 N. 13; von Büren (n 274) 330; Heinrich Honsell, *Schweizerisches Obligationenrecht, Besonderer Teil*, (9th edn, Stämpfli 2010) 344.

282 Rudolph (n 280) Art 419 (6).

283 Suter (n 192) 39-40; Hagenbüchli (n 274) 65-67; Lischer (n 192) 54; also *see* Hermann Becker (ed), Kommentar zum schweizerischen Zivilgesetzbuch, Band VI Obligationenrecht II Abteilung: Die einzelnen Vertragsverhältnisse Art. 184-551 (Stampfli 1934) Art. 419 N. 1 for the view that holds the principal's will to be paramount in the case of a conflict between the subjective will and the objective utility.

284 OR art 424. For the retrospectivity see Suter (n 192) 90; Nipperdey (n 227) § 684, N. 8.

285 The same outcome is valid for the case where the principal could have acted himself; *see* Rudolph (n 280) Art 419 (6).

286 Eugen Bucher, *Obligationenrecht: Besonderer Teil* (3rd edn, Schulthess 1988) § 14 II 3a; Weber (n 274) Art 419/13.

287 Dornis (n 247) 6.

288 The law that will be discussed in this section is primarily the Turkish 'civil law'. Matters pertaining to public law (such as Criminal law, Procedural law, Constitutional law, law of taxation and administrative law) will not be considered. On a general account of Turkish law *see* Tuğrul Ansay, Don Wallace, Işık Önay (eds), *An Introduction to Turkish Law* (7th edn, Kluwer 2020).

289 The 'Turkish Civil Code' *(Türk Kanuni Medenisi/TMK)* and the 'Code of Obligations' *(Borçlar Kanunu/BK)* were both translated from the French versions of the Swiss Civil Code and (the first two parts of) Swiss Code of Obligations respectively, *see* Arzu Oğuz, 'Role of Comparative Law in the Development of Turkish Civil Law' (2005) 17 (2) Pace International Law Review 380-381. On the translation itself, *see* Ruth A. Miller, 'The Ottoman and Islamic Substratum of Turkey's Swiss Civil Code' (2000) 11 (3) Journal of Islamic Studies 335-361, esp. 338-339. Miller labels the Turkish translation of the Swiss Civil Code as 'loose' in light of the considerable number of changes observed in the Turkish version. On the difficulty of the task of translating the trilingual Swiss Civil Code to a fourth language: Turkish, see Esin Örücü, 'One into Three: Spreading the Word, Three into One: Creating a Civil Law System', (2015) 8 (2) Journal of Civil Law Studies 388-397.

Muhtelif nevileri),[290] within the 14th Title, -following the 13th title of 'agency'- under the heading of '*Vekaleti olmadan başkası adına tasarruf* (disposition on behalf of someone else without a mandate)' between articles 410-415; nearly identical to its place in the Swiss Code of Obligations.[291] Furthermore, the location of '*negotiorum gestio*' in the Code of Obligations did remain unaltered after the promulgation of the new Code that replaced the old one;[292] as part of the Second Division, now termed as 'Special Types of Obligatory Relations'(*Özel Borç İlişkileri*), within the 10th Title, -following the 9th title of 'agency relations'- under the heading of "*Vekaletsiz iş Görme* (managing a business without mandate)", now between the articles of 526-531.[293] The rights and obligations of the *gestor*, as well as his liabilities, are laid down in the articles 526-527 whereas the situation of the principal is regulated between articles of 529-531. It is not only the code of obligations that address '*negotiorum gestio'*, but other codes and/or legislations also include references to it.[294]

B. Types of *Negotiorum Gestio* in Turkish Civil Law

The Turkish Code of Obligations (*Türk Borçlar Kanunu*/TBK) follows the German and Swiss codes in acknowledging interventions that are solely for the benefit of the intervenor as instances of '*negotiorum gestio*' per the wording of article 530 which states that even if the intervention was not carried out with the best interests of the principal in mind, he is nonetheless entitled to appropriate any resulting benefits.[295] Accordingly, there can be mentioned two main types of '*negotiorum gestio'* under Turkish law: as genuine and non-genuine.[296] Furthermore, Turkish academia, in line with their German and Swiss counterparts, treat genuine interventions under the dichotomy of 'justified' vs 'unjustified' while non-genuine interventions are deemed

290 For the criticisms of '*negotiorum gestio*' not being a part of the 'First divison of 'General principles' *see* Eren (n 280) 844; H. Kübra Ercoşkun Şenol, 'Gerçek Olmayan Vekâletsiz İş Görmenin Sistematik Açıdan Borçlar Kanunundaki Yeri ve 2020 İsviçre Borçlar Kanunu Tasarısı'ndaki Durum' (2018) 22 (4) Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 37, 38-41.

291 In the in-force Swiss Code of Obligations, the section on '*Negotiorum gestio*' is located in the Second Division of (Special Contractual Relations) - 14th title -following the 13th title of 'agency contract'-, under the heading of ''Agency without authority', between articles 419-424.

292 The 1926 dated, 818 numbered 'Code of Obligations' (*Borçlar Kanunu/BK*) was replaced with the 'new' 2012 dated, 6098 numbered 'Turkish Code of Obligations' (*Türk Borçlar Kanunu/TBK*).

293 The original Turkish term for '*Negotiorum Gestio'* as '*vekaleti olmadan başkası adına tasarruf'* was the subject of criticisms within the Turkish academia; *see* Özdemir, *Vekaletsiz İş Görme* (n 23) 78; Tandoğan, *Vekaletsiz İş Görme* (n 2) 21. Thus, after the promulgation of the new Code (TBK) on 2012, the primary change concerning '*negotiorum gestio'* within the TBK was about its name. The proposed name of "*vekaleti olmadan başkasının işini görme*" by Tandoğan had actually become the legal term corresponding to "*negotiorum gestio*" in Turkish law.

294 Fe *see* TMK art 25/III, art 801-802, art 995; TBK art 630/2; also *see* the 5846 numbered Law on Intellectual and Artistic Works (*Fikri ve Sanat Eserleri Kanunu*/FSEK) art. 70 and the 6769 numbered Industrial Property Law (*Sınai Mülkiyet Kanunu*) art 151/2; also see III B (2).

295 Cf OR art 432/1; BGB art 687/2. On an account of the terminology of *negotiorum gestio* in Turkish-Swiss law *see* Arkan Akbıyık (n 280) 15-21; Tandoğan, *Vekaletsiz İş görme* (n 2) 21-24.

296 Eren (n 280) 829, 834, 842-843; Rona Serozan, Abdülkadir Arpacı, *Borçlar Hukuku Özel Bölüm* (Filiz 1992) 488; Cevdet Yavuz, Faruk Acar, Burak Özen, *Türk Borçlar Hukuku: Özel Hükümler* (10th edn, Beta 2012) 639; Ece Baş Süzel, *Gerçek Olmayan Vekâletsiz İş Görme ve Menfaat Devri Yaptırımı* (On İki Levha 2015) 15-16; also *see* Mustafa Alper Gümüş, *Borçlar Hukuku Özel Hükümler* II (3rd edn, Vedat, 2014) 225-228.

to be either as 'good-faithed' or as 'bad-faithed' depending on the existence of *animus negotia aliena gerendi* on the intervenor part.[297] Swiss-Turkish civil law departs from the German approach and follows the solutions of older *ius commune* for the application of the rules of 'non-genuine *negotiorum gestio*' does not depend on fault, and therefore does not need an *animus negotia aliendi gerendi*, under Swiss-Turkish law. Lastly, while the 'genuine' *negotiorum gestio* includes all lawful acts, juristic or not,[298] the 'non-genuine' *negotiorum gestio*, on the other hand, is acknowledged to be akin to a 'tortious act'.[299]

It is true that the institution of 'non-genuine *negotiorum gestio*' shares many similarities with 'tort' and 'unjustified enrichment',[300] and in certain cases of 'non-genuine *negotiorum gestio*', compensation based on claims of unjust enrichment or tort might also be be avaible.[301] In that regard, the qualification of a legal relation as an 'non-genuine *negotiorum gestio*' is indeed important as it is more advantageous to go for *negotiorum gestio* than to assert tort or unjustified enrichment in court.[302] In that regard, one important difference between the actions of '*negotiorum gestio*' and 'unjustified enrichment' shall briefly be reminded here: Unlike the action of unjustified enrichment, the action of *negotiorum gestio* does not necessarily require any 'enrichment' on the *gestor*'s part.[303]

In the case of a '*negotiorum gestio*' claim, the principal will be able to demand 'all the benefits' that the *gestor* has obtained through the intervention whereas, with the alternative course of actions, the principal can only demand compensation for the damages suffered.[304] "All the benefits" corresponds to the net income earned by

297 *See* II B (1) n 223; for the view which considers the genuine *negotiorum gestio* to be the only valid type, *see* Wittmann (n 202) 63; Schmid (n 192) N.162; also *see* Arkan Akbıyık (n 280) 20-25. For the view that sees the classification of non-genuine *negotio gestiorum* as good faithed vs bad faithed as 'irrelevant' *see*; Hüseyin Avni Göktürk, *Borçlar Hukuku İkinci Kısım: Akdin Muhtelif Nevileri*m (Güney 1951) 526; Necip Bilge*, Borçlar Hukuku Özel Borç Münasebetleri* (Banka ve Ticaret Hukuku Araştırma Enstitüsü 1971) 330-331; Theo Guhl, Anton K. Schnyder, Alfred Koller, Jean N. Druey, *Das Schweizerische Obligationenrecht - mit Einschluss des Handels und Wertpapierrechts* (9th edn, Schulthess 2000) § 49 N. 46; Serap Helvacı, Gülşah Sanem Aydın*, '*Kişilik Hakkı İhlâlinden Doğan Vekâletsiz İşgörmede Kusurun Bir Şart Olarak Aranıp Aranmayacağı Sorunu' (2017) 23 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 265, 284-285.

298 Eren (n 280) 829.

299 Haluk Tandoğan, *Borçlar Hukuku Özel Borç İlişkileri* Vol 2 (5th edn, Vedat 2010) 677; Aydın Zevkliler, Emre Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri* (12nd edn, Turhan 2013) 630*;* Yavuz, Acar, Özen (n 296) 646.

300 It is accepted that the claims deriving from a 'genuine *negotiorum gestio*' shall not compete with the claim of unjustified enrichment, as the relation between the *gestor* and the *principal* is compelled by law and therefore justified. Still, by virtue of TBK art 529/2, which regulates that 'in cases where the *gestor*'s expenses are not reimbursed, he has the right of repossession in accordance with the provisions governing unjust enrichment,' the norms of 'unjustified enrichment' seem to constitute a complementary role in the wake of the principal's failure to reimburse the expenses of the *gestor*; *see* Kemal Oğuzman, Turgut Öz, *Borçlar Hukuku Genel Hükümler* Vol II (10th edn,Vedat 2013) 341.

301 fe in the case where the act of the *gestor* infringes the absolute rights of the principal, the claims of tort and *negotiorum gestio* will both be available; *see* Schmid (n 192) N.466.

302 Yavuz, Acar, Özen (n 296) 646; especially if the element of 'impoverishment' is regarded as the ceiling for demands of reimbursement; *see* Oğuzman, Öz (n 300) 323, 341; also *see* Aksoy (n 276) 108-109; Başoğlu (n 209) 257. Another advantage would be the difference in prescriptive periods, *see* Schmid (n 192) N.1309.

303 Hüseyin Hatemi, 'Türk Hukukunda Gerçek Olmayan Vekaletsiz İş Görme Kurumuna İlişkin Düşünceler' in Nami Barlas, Abuzer Kendigelen, Suat Sarı (eds), *Prof. Dr. M. Kemal Oğuzman'ın Anısına Armağan* (Seçkin 2000) 388.

304 Başoğlu (n 209) 256-259; Honsell, *Schweizerisches Obligationenrecht*, (n 281) 348.

the *gestor* via his intervention. And the net income amounts to the value established after deducting the expenses incurred by the *gestor* from the total gross income which includes interest.[305]

Furthermore, the claim for 'disgorgement of profits' (*kazanç devri*),[306] unlike the claim for unjustified enrichment (*sebepsiz zenginleşme*), allows the demand of the earnings gained by the *gestor* with the help of his subjective skills which may correspond to a value that is well above the market value of the business.[307]

1. Genuine *Negotiorum Gestio*

The genuine *negotiorum gestio* is the typical case of someone -without any authority- managing another's business in his (the principal's) interest and not in violation of his will.[308] These are the cases in which the principal is managing another's business apparently for the benefit of the principal, where the principal himself would have managed his business in the same manner. Eg interventions such as 'breaking into the neighbor's home in order to extinguish a fire' or 'taking someone who had been in a traffic accident to the hospital' or 'having repaired the neighbor's defective wall which was about to collapse', are acts of 'genuine *negotiorum gestio'*. There is no doubt that the principal would have acted to extinguish the fire in his house or would have tried to go to the hospital himself; therefore, it is positive that the act by the *gestor* is done for the interest of the principal and in line with his presumptive wishes. This genuine *negotiorum gestio* is also a 'justified' one as the principal's will -together with his interests- align perfectly with the intervening act of the *gestor*.

The 'unjustified' genuine *negotiorum gestio* on the other hand, would be the case where the intervention by the *gestor* does not satisfy the actual or presumptive will of the principal either because the intervention is against the express wishes of the principal or because there is no real urgency for the *gestor* to intervene; thus, rendering the act of the intervention 'unnecessary'.[309] This type of intervention where the good-willed intervenor is acting for the benefit of the principal when in reality there is no use or need for the intervention itself, is also styled as '*nichtgebotene* (unnecessary)', '*irregulare altruistische* (irregular altruistic)' and '*unerwünschte* (unwanted)' in the Swiss-Turkish academia.[310]

305 Arkan Akbıyık (n 280) 47; Tandoğan, *Vekaletsiz İş Görme* (n 2) 197-198.

306 For 'disgorgement of profits', *see* II B (1) n 219.

307 Aksoy (n 276) 109.

308 Eren (n 280) 831; Guhl/Koller/Schnyder/Druey (n 297) § 49 N. 38, Tandoğan, *Özel Borç İlişkileri* (n 299) 676.

309 For the view that sees 'unjustified genuine *negotiorum gestio*' as being essentially 'non-genuine', *see* Tandoğan, *Vekaletsiz işgörme* (n 2) 71; Eraslan Özkaya, *Vekâlet Sözleşmesi ve Kötüye Kullanılması*, (3rd edn, Seçkin 2013) 1085; Sera Reyhani Yüksel, 'Hekimin Vekâletsiz İş Görmeden Doğan Sorumluluğu' (2015) 21 (2) Marmara Üniversitesi Hukuk Fakültesi Dergisi Özel Sayı: Mehmet Akif Aydın'a Armağan, 793, 801-802; Yavuz, Acar, Özen (296) 641; Baş Süzel (n 296) 35 et seq. The majority view seems to acknowledge 'unjustified genuine *negotiorum gestio*' either as grounds for unjustified enrichment or as an act of delict; *see* Gümüş (n 296) 228; Wittmann, (n 202) 170; Staudinger/Wittmann, N. 5-6; Schmid (n 192) N. 167.

310 Arkan Akbıyık (n 280) 16.

Thus, the 'justified' and 'unjustified' qualifications of a genuine *negotiorum gestio* is directly related to the will of the principal. In both the 'justified' and 'unjustified' types of 'genuine *negotiorum gestio*' the *gestor* is intervening for the benefit of the principal while their contrast lies in the symmetry between the intervention and the 'will of principal', or its lack thereof. If the intervention by the *gestor* is deemed to be in accordance with the actual and presumptive will of the principal, then the intervention is accepted to be a 'justified' one.[311] Conversely, if the principal did forbid the act or the act itself is 'unnecessary', then the intervention is 'unjustified'. Turkish-Swiss law establishes the main criteria for a 'justified, genuine *negotiorum gestio*' as the 'lack of an explicit prohibition from the principal regarding the intervention' and 'the necessity of the act in question', thus diverging from German law where the 'general' condition for an '*echte Geschäftsführung ohne Auftrag*' is deemed to be that the intervention complies with the will and 'interest' of the principal.

The principal's presumptive will is no longer relevant if the principal explicitly forbids the intervention. In the face of such a prohibition, the *gestor* is expected to comply with the prohibition as long as the prohibition is 'valid'[312] and has been done in good-faith.[313] Thus, under Turkish law, the relationship between the *gestor* and the principal will be termed as an "unjustified *negotiorum gestio*" regardless of whether the *gestor*'s intervention benefits the principal or not, provided that the *gestor* violated the principal's prohibition and intervened nonetheless.

The relationship that emerges as a result of the intervention by the *gestor* concerns the internal relationship between him and the principal. However, in the case that the *gestor* enters into a legal transaction with a third party for the principal, there rises a dual relationship: the first being the internal relationship *(Innenverhältnis*) between the *gestor* and the principal; and the other being the external relationship (*Aussenverhältnis*) that is the result of the *gestor*'s transaction with a third party.[314] The rule is that the provisions of *negotiorum gestio* only regulates the interests between the principal and the *gestor*; therefore, a legal transaction that the *gestor* has made with a third party for the principal, does not bind the principal due to the *gestor*'s lack of 'authority to represent'.[315] However, the unconditional and categorical acceptance of such an outcome is claimed by some to lead to unfair and contradictory results and accordingly, it is further argued that in certain cases, the authority arising from the internal relationship (*Innenverhältnis*) shall be given -*in externum*- legal effects.[316]

311 see III B (1) n 223.

312 By 'valid', not being *contra leges* (against law) and/or *contra bonos mores* (against good morals) is meant.

313 Yavuz, Acar, Özen, (n 296) 641; Gümüş (n 296) 229.

314 Kemal Oğuzman, Turgut Oz; *Borçlar Hukuku Genel Hükümler* I (17th edn, Vedat 2019) N. 766; Schmid (n 192) N. 406 et seq; Staudinger/Bergmann (n 223) §§ 677 N. 217.

315 Oser, Schönenberger (n 281) Art. 419 N. 3; Bucher (n 286) 256; Schmid (n 192) N. 409-410; Wittmann (n 202) 145 et seq; Larenz (n 203) 448.

316 Kaya (n 280) 190-191; Schmid (n 192) N.419; Fritz Baur, 'Zur dingliche Seite der Geschäftsführung ohne Auftrag' (1952)

The tendency to give external effects to the internal relation within *negotiorum gestio* is mostly a product of German scholarship.[317] The Swiss-Turkish academia does not seem keen on embracing such an approach although in the case of emergencies, the admittance of a third person, whose intervention directly benefits the principal, might be considered.[318]

2. Non-Genuine *Negotiorum Gestio*

The non-genuine *negotiorum gestio* is the case of someone unjustifiably managing another's business, for the benefit of himself or a third party. The intervention is not done for the benefit of the principal therefore this type of intervention is also called '*İş Gasbı*' (*Geschäftsanmaßung*/encroachment on someone else's business).[319] In practice, it is mostly the absolute rights such as real rights, personal rights and intellectual and industrial rights which are often prone to infringement as part of a 'non-genuine' *negotiorum gestio* while the answer to the question whether relative rights can also be the infringed in terms of an 'non-genuine' *negotiorum gestio* seems to be disputable.[320]

Cases where someone lives in another's house without any permission; or for instance rents that house to a third party or gives the coat of someone else to dry cleaning assuming it is his own; or any kind of copyright infringements are all deemed to be instances of 'non-genuine *negotiorum gestio*'.[321]

However, there seems to be a dispute on the further classification of the cases that fall under the category that is termed as non-genuine *negotiorum gestio*. The points of divergences are about the requirement of 'bad faith' on the *gestor*'s part and whether 'good faithed' interventions which are not malicious in nature and mostly arise out of erroneous assumptions shall also be considered as being 'non-genuine'. For instance, amongst the cases given above, the one with 'the dry-cleaning of someone else's coat' might be given as an example of 'good faithed, non-genuine *negotiorum gestio*' while the rest are obvious cases of 'bad faithed, non-genuine *negotiorum gestio'*. However, unlike the BGB, where the good-faithed interventions are explicitly excepted from

7 (11) JuristenZeitung, 1952, 328-329; compare with Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds.), DCFR (Principles, Definitions and Model Rules of European Private Law), Interim Outline ed (2008) 1285-1288, Art V – 3:106: "(1) The intervener may conclude legal transactions or perform other juridical acts as a representative of the principal in so far as this may reasonably be expected to benefit the principal. (2) However, a unilateral juridical act by the intervener as a representative of the principal has no effect if the person to whom it is addressed rejects the act without undue delay",

317 Kaya (n 280) 193-196.

318 On the efforts to provide a remedy to such situations see Kaya (n 280) 192-196.

319 Hans Reichel, 'Geschäftsführung ohne Auftrag und Vertretung ohne Vertretungsmacht' (1929/30) 26 (13) Die Schweizerische Juristen-Zeitung 199.

320 Gümüş (n 296) 244; Arkan Akbıyık (n 280) 29-33; Baş Süzel (n 296) 55 et seq; Staudinger/Wittmann, 687 N. 6 et seq; also *see* Mansel/Jauernig (n 192) § 687 N. 10 et seq.

321 Arkan Akbıyık (n 280) 15, 20,76-101.

the effects of '*negotiorum gestio',*[322] neither the OR nor the TBK include such an exempting provision leading to a conflict concerning the legal consequences of a 'good faithed, non-genuine *negotiorum gestio'.* The main aspect of controversy is about the obligations of the good-faithed intervenor: Will the good-faithed intervenor be compelled to disgorge the profits or will the principal's claim of 'disgorgement of the profits' (*kazanç devri*) be only restricted against the bad-faithed intervenor? Although some scholars argue that both the good-faithed and bad-faithed intervenor may be subjected to the 'claim of disgorgement of the profits',[323] the majority view holds '*gestor*'s bad faith' to be a necessary condition for the principal's claim of 'disgorgement of profits'.[324] It follows that the legal consequences of a good-faithed intervention will be based on the institution of 'unjustified enrichment' rather than on '*negotiorum gestio'*.[325]

In determining bad faith, the criterion is the *gestor*'s awareness of the fact that the work undertaken is against the law. The *gestor* is also assumed to be in bad faith if he is in a position to be aware of the unlawfulness of his intervention. The burden of proof falls on the principal; he can demand the disgorgement of the profits obtained by the *gestor* by proving bad faith*.* On the other hand, the *gestor*, who does not know and does not need to know that he is intervening in someone else's business, is deemed to be good-faithed. In such a case of good-willed intervention, there is no '*İş Gasbı*' (*Geschäftsanmaßung*) but '*İşe Karışma*' (*Geschäftseinmischung/*interference in someone else's business).[326]

The flexible character of *negotiorum gestio* is apparent also in Turkish law as evident by the variety of fields that the norms of "*negotiorum gestio"* is applied to. As aforementioned, the complementary character of *negotiorum gestio* in issues of restitution was already established in Justinian law and then was re-emphasized during *ius commune*. In modern Turkish law, this complementary character is more prevalent when it comes to cases that involve 'non-genuine *negotiorum gestio'*. It is

322 *see* BGB 687/1.

323 *See* fe Ahmet Esat Arsebük, *Borçlar Hukuku* I-II (3rd edn, Güney 1950) 542; Kemal Tahir Gürsoy, *Borçlar Hukuku Akdin Muhtelif Nevileri* (Ankara, 1955) 143; Hüseyin Avni Göktürk, *Borçlar Hukuku, İkinci Kısım Aktin Muhtelif Nevileri* (Ulus 1951) 526; also *see* Andreas von Tuhr, Hans Peter, Allgemeiner Teil des Schweizerischen Obligationenrechts, (3rd edn, Schulthess 1984) 524, N. 46; Honsell, Schweizerisches Obligationenrecht (n 281) 347.

324 Hatemi, Serozan, Arpacı (n 18) 495; Eren (n 280) 842; Gümüş (n 296), 246; Baş Süzel (n 296) 43; Aksoy (n 276) 105; Arkan Akbıyık (n 280) 38-42; Ercoşkun Şenol (n 290) 40-41; also *see* the draft of Swiss Code of Obligations 2002, art. 69 which states that anyone who encroaches on the legally protected interests of another and thereby makes a profit must reimburse the beneficiary in whole or in part**,** unless he can prove that he neither knew nor should have known about the intervention in the interests of others.

325 Gümüş (n 296), 252; Aksoy (n 276) 109-110; Hayriye Şen Doğramacı, 'Bir Borç Kaynağı Olarak Vekâletsiz İşgörme' in Şebnem Akipek Öcal et al (eds), *Medeni Kanun'un ve Borçlar Kanunu'nun 90. Yılı Uluslararası Sempozyumu: 1926'dan Günümüze Türk-İsviçre Medeni Hukuku* Vol. II (Yetkin 2017) 1501; Utku Saruhan, *Gerçek Vekâletsiz İşgörme* (Yetkin 2018) 51; Hans Nipperdey, Staudinger's Kommentar zum Bürgerlichen Gesetzbuch und dem Einführungsgesetze, II. Band 3. Teil, (10th edn, Berlin 1941) §§ 677 ff. N. 42, 46, 49; Weber (n 274) Art. 419-424 N. 10; Lischer (n 192) 71-72; Larenz (n 203) 453; Martinek, Theobald (n 294) I, 615; Mansel/ Jauernig (n 192) § 687 N. 4; Dieter Medicus, Stephan Lorenz, *Schuldrecht II Besonderer Teil* (18th edn, Beck 2018) § 59 N. 3.

326 Lischer (n 192) 15; Eren (n 280) 843.

generally accepted that there shall be three different conditions for the extension of the application of a 'non-genuine' *negotiorum gestio*, which means that in a case where an unlawful intervention takes place, in order to resort to the norms of '*negotiorum gestio'* three conditions have to be present, namely; 'consideration of set-off' – 'a genuine need for *restitutio in integrum* (restoration to the former position)' and 'a certain degree of evidentiary difficulty to substantiate the claim of 'damages'.[327]

In a case involving an non-genuine *negotiorum gestio*, the main legislative norm is the TBK art 530 and in the lack of an applicable special rule or regulation, it is the TBK art 530 that is to be applied.[328] It is also asserted that, in line with the Swiss academia, the TBK art 530 (and the OR art 440) constitutes 'a legal basis' (*Recshtsgrundverweisung*/*Hukuki temel*) in terms of the application of non-genuine *negotiorum gestio* to certain other fields of private law as opposed to the idea that it is only *negotiorum gestio*'s legal effect of 'disgorgement of profits' that is to be considered (as a *Reschtsfolgenverweisung*) in its complementary application.[329]

Under Turkish law, non-genuine *negotiorum gestio* is applicable as 'a legal basis' (*Recshtsgrundverweisung*) to a variety of cases, ranging from instances of infringement of 'personality rights/intellectual property rights'[330] and of violations of 'statutory/contractual non-competition covenants'[331] to matters involving 'unfair competition'[332]– the 'bad faithed possessor's duty to replevin'[333] – 'lease'[334] and 'simple partnership'.[335]

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327 Schmid (n 192) N.1243.

328 for the claim that, the reason behind including '*negotiorum gestio'* to various different legislations and codes, despite having a general norm as TBK art. 530, is the conviction that TBK art. 530 was deemed to be statutorily insufficient and practically underutilized s*ee* Baş Süzel (n 296) 271.

329 Baş Süzel (n 296) 272-273; Huguenin et al (n 280) Art. 423, N.23.

330 For infringement of personality rights and the 'disgorgement of profits' as a sanction *see* TMK art. 24-25, especially art. 25/3 which establishes that in the case of infringement of personality rights there will be claims for general & special damages and satisfaction for handing over profits in accordance with the provisions governing agency without authority; Cf SCC art 28a/3; also *see* Baş Süzel (n 296) 273-290; Arkan Akbıyık (n 280) 77-81; BGer (*Bundesgericht*/Federal Supreme Court of Switzerland)133 III 153; Yarg. 4. HD (*Court of Cassation 4*th *Civil Chamber*), 7.2.2002, 10199/1371. For the infringement of intellectual property rights, *see* FSEK art. 70/3, which regulates that the person whose moral rights are damaged may also demand disgorgement of profits in addition to compensation; also *see* 6769 numbered *Sınai Mülkiyet Kanunu* (Industrial Property Law) art 151/2; also *see*, Kübra Yıldız, 'SMK Hükümleriyle Karşilaştirmali Olarak FSEK Kapsaminda Gerçek Olmayan Vekâletsiz Iş Görme' (2020) 6 Ticaret ve Fikri Mülkiyet Hukuku Dergisi154 - 171.

331 Cf TBK art 396/3, 446; also *see* Arkan Akbıyık (n 280) 93-94; Baş Süzel (n 296) 326-341.

332 *See* Arkan Akbıyık (n 280) 86-93; Baş Süzel (n 296) 312-326; Cf Turkish Commercial Code (*Türk Ticaret Kanunu*/TTK) art 56/1.

333 Arkan Akbıyık (n 280) 81-84; Baş Süzel (n 296) 341-345; also *see* TMK art 995: "*İyiniyetli olmayan zilyet, geri vermekle yükümlü olduğu şeyi haksız alıkoymuş olması yüzünden hak sahibine verdiği zararlar ve elde ettiği veya elde etmeyi ihmal eylediği ürünler karşılığında tazminat ödemek zorundadır*" (A person possessing a thing in bad faith must compensate the rightful owner for any damage resulting from such wrongful possession, as well as for any fruits he or she collected or neglected to collect), which is stated to be a 'special' norm excluding the general norm of TBK art 530; *see* Arkan Akbıyık (n 280) 39; Tandoğan, *Vekâletsiz İş Görme* (n 2) 316.

334 Baş Süzel (n 296) 345 et seq.

335 *See* TBK art 630/2 where it is hold that if a partner of a simple partnership who lacks management authority conducts business on the partnership's behalf or if a managing partner exceeds his management authority, the provisions governing 'agency without authority' shall apply.

It is also asserted that certain cases of 'emergency medical treatment' by health professionals might be interpreted as a special application of '*negotiorum gestio'*.[336] In cases where there exists no contractual relationship and the medical intervention is performed without the patient's consent, especially due to an emergency intervention, the legal relationship between the physician/hospital and the patient falls within the scope of the *negotiorum gestio*.[337] In that regard, there might be two possibilities where the liability of the physician/hospital arising from the medical intervention is based on *negotiorum gestio*: the first, being the case where the patient is unconscious and there is a real medical urgency for the intervention; the second being the case where the medical intervention in line with the patient's original consent needs to be expanded for urgent reasons while the patient is unconscious or simply not in a condition to give the consent for the expansion of the intervention.[338]

C. Elements of *Negotiorum Gestio* in Turkish Civil Law

1. Genuine *Negotiorum Gestio*

a. Managing the Business of Someone Else

The first condition under Turkish law for a genuine *negotiorum gestio* to rise is that there shall be a managed 'business' which belongs to someone other than the person managing that business. The management may equally involve juristic or non-juristic acts.[339] Furthermore, managing a business shall involve positive acts, negative acts do not constitute the act of 'managing a business' in terms of *negotiorum gestio*.[340] Also, the 'management of business' corresponds to 'real', effective acts; to merely undertake the 'business' in question or take charge of preparatory actions does not constitute to its 'management' and therefore does not -yet- constitute a relation that may be termed as a '*negotiorum gestio*'.[341] The *gestor* does not need to manage the business in person and may choose to use an assistant or vicarious.[342]

336 *See* Reyhani Yüksel (n 309) 794; Nilay Şenol, 'Hekimin Tazminat Sorumluluğu (Hekimin Hukuki Sorumluluğu)' in Aysun Altuntaş, İpek Sevda Söğüt, Hamide Bağçeci (eds), II. Ulusal Sağlık Hukuku 'Tıbbi Müdahalenin Hukuki Yansımaları' Sempozyumu (Seçkin 2014) 120; Zarife Şenocak, *Özel Hukukta Hekimin Sorumluluğu* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1998) 103; Seçkin Topuz, 'Acil Tıbbi Müdahalede Bulunan Hekimin Hukuki Sorumluluğu' (2008) 3 Erciyes Üniversitesi Hukuk Fakültesi Dergisi 293, 294-295; Ferhat Canbolat, 'Kamu Hastanesinde Yapılan Tıbbi Müdahalede Hekimin Özel Hukuktan Doğan Sorumluluğunun Dayanağı' (2009) 80 TBB Dergisi, 156, 167*;* also *see* Andreas Spickhoff, *Medizinrecht,* (3rd edn, Beck 2018) BGB § 680 N. 1; Erwin Deutsch, Andreas Spickhoff, *Medizinrecht* (7th edn, Springer 2014) 130; Adolf Laufs, Bernd-Rüdiger Kern, Martin Rehborn, *Handbuch des Arztrechts* (5th edn, Beck 2019) § 20 N. 89.

337 Kaya (n 280) 379.

338 Kaya (n 280) 379-380; Reyhani Yüksel (n 309) 799; Deutsch, Spickhoff (n 306) N. 431; Mehmet Ayan, *Tıbbi Müdahalelerden Doğan Hukuki Sorumluluk* (Kazancı 1991) 61; Hasan Tahsin Gökcan, *Tıbbi Müdahaleden Doğan Hukuki ve Cezai Sorumluluk* (Seçkin 2013) 1000.

339 Gümüş (n 296), 227; Bucher (n 286) 256.

340 Tandoğan, *Özel Borç İlişkileri* (n 299) 678; Bilge (n 297) 326.

341 Kaya (n 280) 166.

342 Eren (n 280) 832.

As mentioned, the business needs to belong to someone else; if someone manages his own business believing it belongs to someone else, there will be no *negotiorum gestio.* The criterion here will be the link between the managed 'business' and the 'interest' of someone other than the *gestor*. As long as the managed business predominantly serves the interest of the principal then the rise of a *negotiorum gestio* will be admitted. The mere fact that the intervention also serves the interest of the *gestor* is immaterial to the extent that the 'interest' of the principal remains the foremost objective.[343]

b. Lack of Mandate

The other condition for a genuine *negotiorum gestio* is that there needs to be no valid mandate on the part of the *gestor.* In that regard, it does not matter if there had been a valid mandate before: the mandate might have expired or have been terminated/invalidated for some reason;[344] or the *gestor* might be overstepping the legal boundaries of the current mandate he is initially given, in all those cases, the g*estor* will be deemed to be lacking a mandate.[345] The *gestor* shall also be under no legal duty to intervene.[346]

There is indeed a technical difference between 'lacking a valid mandate' and 'having no authority to represent' (*yetkisiz temsil)*.[347] First of all, the *gestor* of *negotiorum gestio* is an -indirect- 'agent' by law (*ex lege*).[348] Secondly, while lacking a valid mandate only concerns the internal relation between the *gestor* and the principal, the case of 'having no authority to represent' concerns their external relation. Furthermore, you may only lack the 'authority to represent' (*temsil yetkisi*) in matters related to judicial acts, whereas any kind of act might be the subject of *negotiorum gestio*.[349]

343 Gümüş (n 296) 228; Staudinger/Bergmann (n 223) § 677 N. 39, 177; Hofstetter (n 192) 237; Oser, Schönenberger, (n 281) Art. 419, N. 13; von Büren (n 274) 330.

344 The Turkish Court of Cassation does apply the norms of *negotiorum gestio* to cases which involve invalid 'contracts for hire of work' (*eser sözleşmesi*); *see* the decision of the 'General Assembly of the Court of Cassation' (*Yargıtay Hukuk Genel Kurulu*/YHGK) dated 18.03.2015 and numbered 2182/1047. The same approach is observed in the decisions of the German Federal Court; *see* BGHZ 39, 87, Urt. v. 31.01.1963-VII ZR 284/6. Furthermore, the Turkish Court of Cassation does consider all the 'additional works' not agreed upon as part of the terms of contract for 'hire of work' as subjects of a '*negotiorum gestio*'; *see* decision of 15th Civil Chamber of Court of Cassation dated 21.03.2019 and numbered 3896/1292, dated 11.2.2019 and numbered 4381/523; and of the 23th Civil Chamber of Court of Cassation dated 26.9.2019 and numbered 7126/3885. For the criticisms *see* Kaya (n 280) 285-287.

345 If there is a valid agency contract between the parties and the *gestor* did overstep the limit of the given mandate then there rises no '*negotiorum gestio*' since by virtue of TBK art 505 which regulates the agent's 'duty to comply with the principal's instructions', it is the TBK art 505 that is to be applied, not the norms of '*negotiorum gestio*'.

346 Cf I Ins.3.27.1.

347 *See* TBK art 46: "*Bir kimse yetkisi olmadığı hâlde temsilci olarak bir hukuki islem yaparsa, bu işlem ancak onadığı takdirde temsil olunanı bağlar*." (Where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless he ratifies the contract).

348 Yavuz, Acar, Özen (n 296) 643.

349 For more on this, *see* Şener Akyol, *Türk Medeni Hukukunda Temsil* (Vedat 2009) 459-460; Adem Yelmen, 'Yetkisiz Temsil' (2015) İnönü Üniversitesi Hukuk Fakültesi Dergisi: Special Issue 429, 431-432; Lischer (n 192) 121.

c. Animus negotia aliena gerendi

It is sufficient for the *gestor* to have the motive and will to manage the business for the benefit of others; he does not need to specifically know the identity of the principal, nor needs to have any prior connection with him. The principal may even not exist in time of the intervention.[350] The main condition here is that the *animus negotia aliena gerendi* is present from the beginning of the intervention; thus, in the case of a dispute about whether the *gestor* intervened for his own interest or not, the exact time when the intervention has begun will be taken into consideration. The burden of proof lies with the principal.

d. Necessity

Lastly, the intervention of the *gestor* shall be 'necessary' for the principal. Every intervention that is in the 'best interests' of the principal is also 'necessary' from him as expressly laid down in the TBK art. 529/1.[351] Furthermore, if the principal is in no position to defend his rights or if he is in special need of assistance then the *gestor*'s intervention will be deemed as necessary.[352] For the assessment of the necessity of an intervention, the standard course of action expected from a reasonable and prudent person is to be considered.

2. Non-Genuine *Negotiorum Gestio*

The conditions for a non-genuine *negotiorum gestio* to rise are mostly similar with the genuine *negotiorum gestio*. With a non-genuine *negotiorum gestio*, as it is in a genuine *negotiorum gestio*, there shall be a business managed which shall belong to someone else other than the *gestor* and the *gestor* who is managing the business shall be lacking a 'valid' mandate.[353] The *gestor* shall also not be acting out of any legal duty on his part.

The main difference between the genuine and non-genuine types of *negotiorum gestio* concerns the real motive of the *gestor*; as for an intervention to be termed as 'non-genuine', the *gestor* shall be managing the business solely for his own benefit,

350 Such is the case of managing the business of a company that is still in the stage of its establishment; *see* von Büren, 331.

351 TBK art 529/1: "*İşsahibi, işin kendi menfaatine yapılması halinde, işgörenin, durumun gereğine göre zorunlu ve yararlı bulunan bütün masrafları faiziyle ödemek ve gördüğü iş dolayısıyla üstlendiği edimleri ifa etmek ve hakimin takdir edeceği zararı gidermekle yükümlüdür*." (Where the intervention was in the best interests of the principal, he is obliged to reimburse the *gestor* for all expenses that were necessary or beneficial and appropriate in the circumstances -plus interest-, to release him to the same extent from all obligations assumed and to compensate him at the judge's discretion for any other damage incurred). For the view which sees 'being necessary' as more than 'being beneficial', *see* Honsell, *Schweizerisches Obligationenrecht* (n 281) 344; Hofstetter (n 192) 261; for the view which asserts that the intervention shall also be of urgent nature, *see* Bucher (n 286) 258; Weber (n 274) Art. 419 N. 13.

352 Huguenin (n 274) N. 1627.

353 Since the 'non-genuine' *negotiorum gestio* is akin a tort, the lack of a valid mandate will equal to having no legal right to intervene, and thus an act of unlawfulness, as there is no justifying valid legal cause for the intervention itself; see Eren (n 280) 844; Gümüş (n 296), 245; Cf D. 3.5.5.5

without any regard or consideration for the interest of the principal. A genuine *negotiorum gestio* exists when the *gestor* is managing the business of another with an intention to benefit him. On the other hand, if the *gestor*'s actions -willingly or unwillingly- do not target to benefit the principal then what we have is a a non-genuine *negotiorum gestio*.

The *gestor* falsely thinking he is managing his own business is obviously serving his own interest and this subjectively benevolent but objectively selfish intention is precisely what separates the 'genuine *negotiorum gestio'* from the 'non-genuine'. The *gestor*'s intention might be based on an erroneous assumption which in turn taints his intention, resulting in a lack of *animus negotia aliena gerendi* on his part; or the *gestor*'s intention might be based on plain bad faith targeting to unjustly profit over the principal. Both of those cases fall under the category of 'non-genuine' *negotiorum gestio,* the former as being 'good-faithed' and the latter as being 'bad-faithed'. Accordingly, in Turkish law, the *gestor* having an *animus negotia aliena gerendi* is a requirement only for instances of 'genuine *negotiorum gestio'*; not for *'*non-genuine *negotiorum gestio'* as can be seen in the decisions of the Turkish Court of Cassation.[354]

Thus, for non-genuine interventions, the question whether the *gestor* is intervening with bad faith is vital; if the intervention is malicious, then the bad faith of the *gestor* will be taken into consideration, and he will be subjected to the principal's claims of disgorgement of profits in addition to his claim of damages. As for the probability of competing claims of 'disgorgement of profits' and of 'loss of profits' (*lucrum cessans*) or 'actual loss' (*damnum emergens*), there seems to be differing solutions for each case: F.e, in the event of the competing claims of 'disgorgement of profits' and the 'loss of profits', the principal may not claim damages for 'loss of profits' together with 'disgorgement of profits'. If the 'damages' is limited to the 'loss of profits', then either the 'loss of profits' or the 'disgorgement of profits' should be claimed as they both target to remedy the same loss. If the principal's loss of profits exceeds the gained profits of the intervener, then the principal shall claim for 'loss of profits' instead of 'disgorgement of profits'.[355]

354 *See* fe Court of Cassation's Decision on the Unification of Judgments (*Yargıtay İçtihadı Birleştirme Kararı*) dated 04.06.1958 and numbered 15/7:" ….*hakiki vekaletsiz tasarrufun kanuni şartları arasında, iş görenin başkasının işini gördüğü iradesiyle hareket etmiş olması durumu varsa da hükmi vekaletsiz tasarrufta böyle bir şart aranmaz*." (… Although the fact that the *gestor* has acted with an *animus negotia aliena gerendi* constiutes a statutory prerequisite for a genuine *negotiorum gestio,* no such condition is required for a non-genuine *negotiorum gestio*.). Also s*ee* Yavuz, Acar, Özen (n 296) 641; Tandoğan, *Vekaletsiz İş Görme* (n 2) 171-172; Zevkliler, Gökyayla (n 299) 653.

355 Başoğlu (n 209) 258. On the other hand, especially in matters involving intellectual property infringements, it can be argued that the two remedies are indeed different from each other and in that regard, neither their theoretical justifications nor their objectives do resemble each other. The remedy of lost profits (*lucrum cessans*) is intended to restore the patentee to his former position prior the infringement, while disgorgement may target different purposes such as discouraging infringement, reclaiming the wrongful gains of the infringer, and enticing prospective users of patented technology to negotiate for a license; For more on the comparison of the claims of 'Loss of Profits' vs 'Disgorgement of Profits' in terms of intellectual property law, *see* Christopher B. Seaman, Thomas F. Cotter, Brian J. Love, Norman V. Siebrasse, Masabumi Suzuki, *Lost Profits and Disgorgement, Patent Remedies and Complex Products: Toward a Global Consensus* (Cambridge

However, in the case of the claim for the damages for actual loss (*damnum emergens*), there is no obstacle to prevent the principal from claiming both the disgorgement of profits and the compensation for damages since, in most cases, the gained profits will not correspond to the actual loss of the principal.[356]

On the other hand, if the intervention is not malicious, then the rules of unjustified enrichment will be applied. In that regard, 'the *gestor*'s bad faith' is argued to be a prerequisite for 'non-genuine *negotiorum gestio';* and, thus, a subjective requirement for the remedy of the 'disgorgement of profits.[357]

D. Legal Consequences of *Negotiorum Gestio* in Turkish Civil Law

1. Genuine *Negotiorum Gestio*

a. Obligations and Liabilities of the *Gestor*

The *gestor*, first and foremost, is under the duty to manage the business in accordance with the interest and the actual or presumptive will of the principal.[358] If the interest of the principal contradicts his 'will' -either actual or presumptive-, then the 'will' of the principal prevails and the *gestor* shall manage the business in line with the wishes of the principal.[359] The *gestor* is under a 'duty of care' -similar to the 'duty of care' foreseen in the law of 'agency',[360] which also includes the duties of 'loyalty' and 'confidentiality'.[361] In the case of the *gestor* intervening as a requirement of his profession or in exchange of a renumeration then the standard of care will elevate accordingly.[362] The *gestor* is also obliged at the principal's request, which may be made at any time, to give an account of his activities and to return anything received as a result for whatever reason including the reimbursement of interests, if there are any.[363]

As for the *gestor*'s duty to continue the intervention (*Fortführungspflicht*), the majority view of Turkish-Swiss law rejects such a duty on the *gestor*'s part.[364]

University Press 2019) 50-51; for Turkish law *see* Yıldız (n 330) 157 et seq; Baş Süzel (n 296) 292 et seq.

356 The contrary is not impossible; fe the *gestor* might have managed the business of the principal in such a way that the principal may have experienced loss from one operation while, owing to the *gestor*'s intervention, might have profited from a rival operation which is also owned by him.

357 Eren (280) 845; Arkan Akbıyık (n 280) 38; as a subjective element.

358 *See* TBK art 526.

359 Hofstetter (n 192) 263; Huguenin (n 274) N. 1650; Maissen, Huguenin, Jenny (n 280) Art. 419, N. 18.

360 *See* TBK art 506; although the *gestor*'s duties of loyalty and confidentiality shall be judged more leniently in *negotiorum gestio* compared with 'agency'.

361 Tandoğan, *Vekaletsiz İş Görme* (n 2) 192.

362 Schmid (n 192) N.433; Guhl, Koller, Schnyder, Druey (n 297) § 49 N. 11-12; Lischer (n 192) 94. For an opposing view *see* Loyal (n 203) 260-261.

363 *See* TBK art. 530.

364 Tandoğan, *Vekaletsiz İş Görme* (n 2) 184-185; *see* also TBK art 512: "The principal and the agent may, at any time, unilaterally terminate the contract with immediate effect. However, a party doing so at an inopportune juncture must

The only exception might be the case where the interruption or termination of the intervention carries the risk of causing damages to the principal and that risk is a direct consequence of the intervention. Then, the *gestor* shall be deemed to be under a duty -albeit restricted- to continue the intervention.[365]

In the case of an error on the *gestor*'s part regarding the necessity of the intervention and/or the will of the principal; the question whether that error will have any effect depends on the stage when the *gestor* errs. In other words, if the *gestor* is in error about his intervention's necessity or the will of the principal before assuming to manage the business then, as mentioned before,[366] there rises a - 'genuine' but unjustified- *negotiorum gestio.* On the other hand, if the *gestor* started to manage the business and then during his management errs in determining the genuine will of the principal and the degree of the necessity of his intervention, then it might be argued that there has risen a valid *negotiorum gestio* between the parties, but the *gestor* is in violation of his 'duty of care'.

If the *gestor* violates his obligations and causes any damages to the principal, he will be held responsible, as by law, the *gestor* is under the 'liability of fault' (*omnis culpa*);[367] meaning that he will be liable of 'ordinary negligence' (*culpa levis*) together with 'gross negligence' (*culpa lata*), fraud and intent (*dolus*). [368] There shall be a causation between the intervention and the damage, where the *gestor* intervened in order to avert imminent damage to the principal, his liability is judged more leniently.[369] The threat of danger may involve bodily harm or pecuniary damage; or the act in question may pose a threat against the moral values of the principal such as honor, reputation or personal dignity. The threat of danger must be 'real' and 'present'.[370]

Conversely, where the intervention is carried out against the express or otherwise recognizable will of the principal, the *gestor* additionally becomes liable of 'unexpected circumstances' (*casus forti*) unless the prohibition by the principal is neither immoral nor illegal and/or the *gestor* can prove that the 'unexpected circumstances' would have occurred even without his involvement.[371]

The article 112 of the Turkish Code of Obligations which lays down the general norm on 'liability from contracts' appears to be the only applicable provision to

compensate the other for any resultant damage."

365 Schmid (n 192) N. 441; Suter (n 192) 35-36.

366 See III B (1).

367 *See* TBK art 527/1: "*Vekâletsiz işgören, her türlü ihmalinden sorumludur."* (The *gestor* is liable of any negligence).

368 Cf D. 3.5.10; also *see* fe the *rationale* of TBK art 115.

369 TBK art 527/1. In the event that the principal is at a 'contributory fault' in the emergence of the danger or the damage itself, such a matter shall also be taken into consideration when determining the liabilities of the parties.

370 Tandoğan, *Vekaletsiz İş Görme* (n 2) 214-215; Schmid (n 192) N. 470; Staudinger/Bergmann (n 223) §680 N. 9; Suter, (n 192) 52; Manfred Wandt, *Gesetzliche Schuldverhältnisse: Deliktsrecht, Schadensrecht, Bereicherungsrecht* (9th edn, F. Vahlen 2019) §5 N. 68.

371 TBK art 527/2.

be resorted to in the absence of a special regulation.[372] It follows that for matters related to f.e. 'prescriptive period', 'liability for the actions of the assistants' (*culpa in eligendo*), and 'presumption of *culpa*/fault', the general solutions also apply to *negotiorum gestio* to the extent that they are appropriate and pertinent.[373]

The *gestor* is more-or-less free in choosing the means to manage the business as long as his general course of action is in line with the express or presumptive wishes of the principal.[374] Lastly, where the *gestor* lacks the capacity to contract, he is liable for his actions only to the extent that he is enriched; or, if there is any alienation in bad faith by the *gestor*, then to the extent of the alienated enrichment.[375]

b. Obligations and Liabilities of the Principal

The principal, on the other hand, is under the duties to reimburse the necessary, useful and appropriate expenses incurred by the *gestor*, to release the *gestor* from the debts he has undertaken and compensate for the losses incurred.[376] The 'receivable' expenses shall both be necessary and appropriate to see the business done and must be proportionate to the interests of the principal.[377] Elements of necessity and eligibility are determined from an objective standard, in line with the principal's presumptive will and the intended consequences while the value and amount of the expenses should be determined according to the time period that they are incurred, and any subsequent price changes shall not be taken into account.[378] The claim for expenses becomes due and payable as soon as they are incurred; so do the claims for interest.[379]

The type of expenses that do not provide any benefit to the principal or inconsistent with his interests/instructions or are plain unreasonable, shall not be reimbursed by the principal. Furthermore, expenditures of the *gestor* borne in the course of an unlawful or immoral business shall also not be the subjects of any reimbursement claims on the *gestor*'s part.[380]

372 TBK art 112: "*Borç hiç veya gereği gibi ifa edilmezse borçlu, kendisine hiçbir kusurun yüklenemeyeceğini ispat etmedikçe, alacaklının bundan doğan zararını gidermekle yükümlüdür.*" (When an obligor fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault.).

373 Gümüş (n 296), 234-235; Aeby (n 280) 49, 96; George Gautschi, Berner Kommentar zum schweizerischen Zivilgesetzbuch, das obligationrecht, 2. Abteilung, Die einzelnen Vertagsverhaltnise, 5. Teilband, Kreditbrief und Kreditauftrag, Mäklervertrag, Agenturvertrag, Geschäftsführung ohne Auftrag, Art. 407-424 OR (Stampfli 1964) art 419-424 N.5a-c.

374 Staudinger/Bergmann (n 223) § 677 N. 17, § 683 N. 1.

375 TBK art 528. The *gestor*'s liability in tort is reserved.

376 TBK art 529; Cf OR art 422/1.

377 Weber (n 274) Art. 422, N. 6; Schmid (n 192) N. 44; Pierre Tercier, Pascal G. Favre, Damien Conus, *Les Contrats spéciaux* (4th edn, Schulthess 2009) N. 5995.

378 Tandoğan*, Vekaletsiz İş Görme* (n 2) 272; Schmid (n 192) N. 45, 498; also *see* Yarg. 15. HD., E. 2011/4482 K. 2012/1875, T. 26.3.2012; E. 2012/1828 K. 2012/6953, T. 8.11.2012; E. 2006/2268 K. 2007/2383, T. 12.04.2007 (Turkish Court of Cassation (*Yargıtay*) decisions of 15th Civil Chamber of Court of Cassation (*Hukuk Dairesi*/HD) dated 26.03.2012 and numbered 4482/1875; dated 08.11.2012 and numbered 1828/6953; dated 12.04.2007 and numbered 2268/2383)

379 Schmid (n 192) N. 46-47; Tercier, Favre, Conus (n 377) N. 5987; Gautschi (n 373) Art. 422, N. 6; Hofstetter (n 192) 206.

380 Tandoğan*, Vekaletsiz İş Görme* (n 2) 144; Gautschi (n 373) 59.

The principal is also obliged to compensate the *gestor* at the judge's discretion for any damages incurred, and in that regard no fault is required on the principal's part.[381] The 'damages' may comprise both tangible and intangible losses.[382] The judge might unilaterally burden the principal or opt for allocating the liabilities between the parties. The claim of the compensation for the damages becomes due and payable the moment the damage has occurred.[383] As for the *gestor*'s claim for renumeration, the majority view maintains that renumeration may be demanded provided that the work done by the *gestor* is the type of regular work undertaken as a matter of profession.[384] However, this shall also not mean that demands for renumeration is restricted only for professionals.[385]

In the event of the *gestor* not being satisfied over his demands for reimbursement, he is vested with the 'right of removal' (*Wegnahmerecht*) under the provisions of the institution of 'unjustified enrichment', as laid down in the article 529/2 of the TBK.[386] However, in order for the *gestor* to validly exercise his right, first and foremost, the principal shall be under no legal obligation to reimburse the *gestor*'s expenses. Therefore, it is only for expenses which are deemed to be 'unreasonable', 'unnecessary' or 'not beneficial', that the *gestor* may resort to this right.[387] It does not matter whether or not the removal of the installation is beneficial to the *gestor*, the *gestor* may choose to exercise his 'right of removal' regardless.[388] On the other hand, if the removal will have a detrimental effect on the value of the thing, then the *gestor* shall not be admitted the 'right of removal'. [389]

Another remedy that the *gestor* might resort to in case of the principal's non-performance is the 'right of retention', as laid down in article 950 of the Turkish Civil

381 It is asserted that this 'strict liability' of the principal is based on the 'principle of equity'; see Eren (n 280) 839; Yavuz, Acar, Özen (n 296) 645.

382 Schmid (n 192) N. 54, 63; Tandoğan, *Özel Borç İlişkileri* (n 299) 682; Cf KTK (*Karayolları Trafik Kanunu*/Highway Traffic Law) art 90.

383 Schmid (n 192) Art. 419-424 OR, Art. 422, N. 58.

384 By analogy with TBK art 502/3: "….. *Sözleşme veya teamül varsa vekil, ücrete hak kazanır*." (Remuneration is payable where agreed or customary.); also *see* Haluk Tandoğan, 'Vekaletsiz İşgörenin Ücret Talebi' (1955) 12 AÜHFD 384-391; Hofstetter (n 192) 206; Pierre H. Engel, *Contrats de droit Suisse* (2nd edn, Stampfli 2000) 530. The Swiss draft Code of Obligations (2020), in its article 75/2, expressly regulates the principal's duty to reimburse the *gestor*'s demand for remuneration on the condition that the *gestor* has undertaken the type of regular work undertaken as a a matter of his profession. While this provision sheds light on the controversy regarding the *gestor*'s renumeration, it also provides a blanket refusal to demands of renumeration for anyone intervening in a non-professional capacity; *see* Huguenin, Chappuis (n 275) Art. 75 N. 7.

385 Köhler (n 203) 363-364.

386 TBK art 529/2: "*İşgören, yapmş olduğu giderleri alamadığı takdirde, sebepsiz zenginleşme hükümlerine göre ayırıp alma hakkına sahiptir*." (Where the agent's expenses are not reimbursed, he has the right of removal in accordance with the provisions governing unjust enrichment). Compare with TBK art 80/III.

387 Tandoğan, *Vekaletsiz İş Görme* (n 2) 286-287, 298-301; Oser, Schönenberger (n 281) Art. 422 N. 9; Schmid, (n 192) N. 500; Hagenbüchli, (n 274) 76-77; Huguenin, Chappuis (n 275) Art. 76 N. 15; Weber (n 274) Art. 422 N. 7; Maissen, Huguenin, Jenny (n 280) Art. 422 N.8; Cf Arkan Akbıyık (n 280) 58 fn 239.

388 Tandoğan, *Vekaletsiz İş Görme* (n 2) 290-291; Kenan Tunçomağ, *Türk Borçlar Hukuku, Genel Hükümler* I (6th edn, Sermet 1976) 642; Özdemir, *Vekaletsiz İş Görme* (n 23) 631.

389 Turgut Öz, *Öğreti ve Uygulamada Sebepsiz Zenginleşme* (Kazancı, 1990) 165-166; Tandoğan, *Vekaletsiz İş Görme* (n 2) 288-289. Schmid (n 192) N.501; Aeby (n 280) 93.

Code (TMK). The *gestor*, in order to secure his claims arising out of the *negotiorum gestio*, might exercise his 'right of retention' over the immovables and negotiable instruments which are gained as a consequence of the managed business.[390] The *gestor* may continue to retain such goods until his demands for compensation of damages and/or reimbursement of expenses are satisfied.[391]

c. Prescriptive Period and the Effect of 'Approval'

There is no provision in the TBK regarding the prescriptive period for the claims of both the principal and the *gestor*. Additionally, Turkish Civil law lacks a unitary approach to prescriptive periods concerning obligations, unlike what is recently observed within the European regulatory endeavors.[392] The 'genuine *negotiorum gestio*' is deemed to be a 'quasi-juristic act' (*hukuki işlem benzeri*) in Turkish Law; and thus, the claims of the *gestor* and the principal are subject to a 10-years long prescriptive period;[393] which is the general prescriptive period for claims.[394] However it is also argued that for 'certain claims'[395] deriving from *negotiorum gestio,* the 5-years long prescriptive period laid down in the art. 147 of the TBK is to be applied.[396]

A genuine *negotiorum gestio,* be it justified or unjustified, can subsequently be accepted by the principal; that is, the principal might consent to the business managed by the *gestor* and accordingly give his approval.[397] In the case of the principal's approval, the provisions governing agency become applicable retrospectively (*ex tunc*).[398]

In the 808 numbered 'abolished' Code of Obligations, the term used instead of 'approval/approbation' (*uygun bulma*)[399] was 'ratification' (*icazet*), which became a

390 Tandoğan, *Vekaletsiz İş Görme* (n 2) 292 et seq; Schmid (n 192) N.551; Özkaya (n 309) 1096 - 1097.

391 Tandoğan, *Vekaletsiz İş Görme* (n 2) 292-293; Özdemir *Vekaletsiz İş Görme* (n 23)127-128; also *see* Suter (n 192) 111-112.

392 Such as the 'Draft Common Frame of References (DCFR)' or the 'Draft Swiss Code of Obligations (2020)'.

393 Tandoğan, *Özel Borç İlişkileri* (n 299) 683; Yavuz, Acar, Özen (n 296) 645; Hofstetter (n 192) 196; Engel (n 384) 50; Bucher (n 286) 261; Tercier, Favre, Conus (n 377) N. 6008; Schmid (n 192) N. 83; Miassen, Huguenin, Jenny (n 280) Art. 419, N. 22, Art. 422, N. 9.

394 TBK art 146: "*Kanunda aksine bir hüküm bulunmadıkça, her alacak on yıllık zamanaşımına tabidir*." (All claims are subject to a ten years prescriptive period unless otherwise provided by law).

395 Such as claims deriving from periodic payments and claims which are in connection with 'work carried out by tradesmen and craftsmen' or 'purchases of retail goods'.

396 Yavuz, Acar, Özen (n 296) 645; Tandoğan, *Özel Borç İlişkileri* (n 299) 484; cf TBK art 147/5.

397 TBK art 531: *"İşsahibi yapılan işi uygun bulmuşsa, vekâlet hükümleri uygulanır*." (Where the managed business is 'subsequently approved' by the principal, the provisions governing agency become applicable).

398 However, it also follows that the principal's approval shall not prejudice third persons, nor shall it adversely affect their acquired rights prior to the approval; see Tandoğan, *Vekaletsiz İş Görme* (n 2) 254-255; Bilge (n 297) 332.

399 The original term proposed in the first draft was '*onama*' (assent) however, since it is not only the *gestor*'s legal transactions that can be accepted by principal the term '*uygun bulma'* (approval/approbation) was instead inserted by the subcommittee; *see* report of Justice Committee (*Adalet Komisyonu*), E. 1/499 K. 21, 2009, p. 41. As for the English term for '*uygun bulma'*, we do not see any technical differences between 'approval' and 'approbation' even when their Latin roots -*approbatio*/*approbo*- are comparatively considered. Thus, they are more or less the same term, expressing the same act, with '*approbo*' having a more positive tone. Both of these terms may be found in Cicero's writings and if we need to make a distinction between them, then it may be argued that '*approbo*' mostly involve 'positive acts' not susceptible

subject of criticisms within the academia due to the differences between the legal effects of 'approval' and 'ratification'.[400] With *negotiorum gestio* there is indeed no pending relation between the principal and the intervenor to be ratified; the acceptance of the *gestor*'s intervention by the principal does neither constitute an 'offer to contract' nor does lead to the formation of a 'contract of mandate';[401] thus, what the principal exercises for accepting the *gestor*'s business, is his 'right to approve', not the 'right to ratify'. [402]

The 'right to approve' is a 'right effective in changing legal relations' (*Gestaltungsrecht - yenilik doğuran hak*),[403] therefore a unilateral declaration of intent by the principal, either explicitly or implicitly, is sufficient for the valid exercise of the 'right to approve'. The 'right to approve', similar to all other types of 'rights effective in changing legal relations', shall be exercised without any conditions, and cannot be reverted once asserted.[404]

2- Non-Genuine *Negotiorum Gestio*

a. Obligations and Liabilities of the *Gestor*

In cases of non-genuine *negotiorum gestio*, the *gestor* is deemed to be under a substantial degree of responsibility against the principal. The principal has the right to obtain the benefits arising from the works performed by the *gestor* for his own benefit.[405] The principal's benefit may correspond to revenues from various sources, such as the income obtained by the *gestor* over the sale of the goods produced by the unfair use of the patent right of the principal, or the earnings from the sale or lease of the principal's property, or etc.

The right of the principal to demand the 'disgorgement of the profits' is a personal right (*in personam*); not a real one (*in rem*); thus, restitution shall be demanded via the course of action that would be valid for the replevin of the assets that comprise the profits.[406]As mentioned above, the 'profits' do correspond to the 'net' income which is the value arrived at after subtracting the expenses from the sum of gross income and interest.

to speculations, while '*approbatio*' could also mean 'acquiescence'; *see* fe Cic. Brut. 49.185; Cic. Off. 1.28.98; Cic. Or. 71.236. However, those etymological variances do amount to minor substantial deviations.

400 For the criticisms, *see* Yavuz, Acar, Özen (n 296) 647; Gümüş (n 296) 232; for the differences between *ratihabitio* vs *consensus* in classical Roman law *see* Avorel (n 38) 89.

401 Huguenin (n 274) N. 909; Hofstetter (n 192) 249, 253.

402 Yavuz, Acar, Özen (n 296) 647.

403 Hüseyin Hatemi, Rona Serozan, Abdülkadir Arpacı, *Borçlar Hukuku: Özel Bölüm* (Filiz 1999) 496; Yavuz, Acar, Özen (n 296) 647; Gümüş (n 296), 232; also *see* Hofstetter (n 192) 253; Lischer (n 192) 11. The 'right to approve' is also a 'right that modifies legal relations' (*Andernde Gestaltungsrechte*/*Değiştirici yenilik doğuran hak*).

404 Vedat Buz, *Yenilik Doğuran Haklar* (Yetkin 2005) 50, 57 et seq.

405 TBK art 530/1

406 Eg in the case of a movable: via an agreement on a real contract followed by the delivery of possession; in the case of an immovable, via registry at the Land registry and in the case of claim, via the 'assignment of claim'.

The principal cannot demand from the *gestor* more than the income he has earned as a result of the managed business; he also cannot claim that more income would be generated if the *gestor* had shown the necessary standard of care. That is because, by virtue of TBK art. 530, the sole statutory duty imposed on the '*gestor* intervening for his own benefit' is 'non-interference'; the intervenor is not under any degree of the 'duty of of care'.[407] The principal may request only the incomes that the *gestor* derived from managing the principal's business. In other words, the *gestor* cannot be asked to return the earnings obtained from sources other than the business belonging to the principal.[408]

The *gestor* is also under the duty to provide information to the principal about the work performed and, in particular, to submit the documents related to the managed business.[409] The *gestor,* owing to the wrongfulness of his intervention, is also liable to the principal of any kind of damages that he may incur, including damages occurring under unexpected circumstances.[410] The *gestor* can avoid liability if he can prove that the damages would have occurred even without his involvement.

b. Obligations and Liabilities of the Principal

The principal may enrich as a consequence of the *gestor*'s intervention; if that is the case, then the principal is under the duty to reimburse the expenses of the *gestor* in proportion to his enrichment.[411] Therefore, in such a case, the principal deducts the expenses incurred by the *gestor* from the gross income derived from the managed business. At the end of this deduction, the *gestor* is obliged to return only the net income to the principal, as he is reimbursed for his expenses.[412] If there is no enrichment on the principal's part, then the g*estor* cannot demand reimbursement from the principal for the expenses incurred.[413] With an non-genuine *negotiorum gestio* the content of the *gestor*'s demand for reimbursement of his expenses is interpreted rather narrowly as compared with a genuine one,[414] owing to its general consideration as an 'unlawful intervention'.[415] Likewise, the principal is under the legal duty to release the *gestor* from the debts he has undertaken for the business, to the extent of the *gestor*'s enrichment. On the other hand, if there is no enrichment on the *gestor*'s part, then there is no need to release the *gestor*.

407 Hofstetter (n 192) 215.

408 Eren (n 280) 847.

409 The *gestor* shall be asked to produce documents in the proof of his expenses. Cf TBK art 508/1.

410 TBK art 527/2.

411 TBK art 530.

412 Huguenin (n 274) N. 2183.

413 For opposing views *see* Gautschi (n 373) art. 423 N.11b and Lischer (n 192) 104 who argue that only 'necessary expenses' might be claimed; also *see* Gümüş (n 296) 240.

414 *See* Tandoğan, *Vekaletsiz İş Görme* (n 2) 298-299.

415 Accordingly, in a non-genuine *negotiorum gestio* the *gestor* lacks the 'right of retention'.

The 'Turkish Code of Obligations' (TBK) does not grant the *gestor* the right to demand compensation for the damages incurred while managing the business of the principal -for his own benefit-. Thus, while the TBK grants such a right to the *gestor* who manages the principal's business for the benefit of the principal (genuine *negotiorum gestio*),[416] the *gestor* who manages the principal's business for his own benefit (non-genuine *negotiorum gestio*) is understandably deprived from demanding the restitution of his damages incurred during his tortious intervention.[417] Here, the *gestor* intervenes unlawfully and maliciously, infringing an absolute right of the principal and gaining a benefit as a result. It would indeed be unthinkable to admit the perpetrator of a tortious act to demand compensation from his blameless victim.[418]

c. Prescriptive Period and the Effect of 'Approval'

The 'non-genuine *negotiorum gestio'* is acknowledged to be akin a tort, therefore the time limit for the principal's claim for 'disgorgement of profits' against the *gestor* is 2 years which is the prescriptive period for 'torts' within the TBK art. 72/1 and for claims of 'unjustified enrichment' within the TBK art. 82.[419] The prescriptive period of 2 years commences from the date the principal learns of the intervention and of the ensuing profits.

There may be two different exceptions to the 2 years long prescriptive rule; the first, being the case where the *gestor*'s invention is subject to a longer statute of limitation since the intervention also constitutes an offence under criminal law;[420] the second, being the case where the *gestor*'s infringement of the principal's absolute rights also constitutes a breach of a contract that is already effective between them.[421]

Lastly, as for the approval of 'non-genuine *negotiorum gestio*', the majority view maintains that 'a non-genuine *negotiorum gestio'* is not susceptible to 'approval', although the issue seems far from resolved.[422] The argument here lies in the fact that

416 *See* TBK art 529/1.

417 *See* TBK art 530.

418 Eren (n 280) 850.

419 Tandoğan*, Özel Borç İlişkileri* (n 299) 683; Yavuz, Acar, Özen (n 296) 647. For the view that characterizes the difference between the 2 years prescriptive period foreseen for the bad faithed *gestor* and the 10 years period anticipated for the altruistic/good faithed *gestor* as 'unjust and unfair' *see* Gautschi (n 373) Art. 423, N. 8d; Honsell, *Schweizerisches Obligationenrecht* (n 281) 335 et seq. In that regard it is argued that both the bad faithed/selfish *gestor* and the good faithed/altruistic *gestor* shall be subjected to the same prescriptive period of 10 years. For a decision of the Court of Cassation which applies the 10-year prescriptive period of the abolished, 808 numbered TBK's art. 414, to a case of *negotiorum gestio*, *see* II B (4) n 277.

420 *see* TBK art 72/2: "*Ancak, tazminat ceza kanunlarının daha uzun bir zamanaşımı öngördüğü cezayı gerektiren bir fiilden doğmuşsa, bu zamanaşımı uygulanır*." (However, if the action for damages is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the civil law claim)

421 Eren (n 280) 850.

422 Arkan Akbıyık (n 280) 52; Gümüş (n 296), 232; Eren (n 280) 850; Hofstetter (n 192) 251; Lischer (n 192) 110. For opposing views *see* Yavuz, Acar, Özen (n 296) 647; Tandoğan, *Vekâletsiz İş Görme* (n 2) 250; also *see* Huguenin (n 274) N. 2194. Gautschi (n 373) Art. 419, N.11; Suter (n 192) 83-84; Oser, Schönenberger (n 281) Art. 424, N.1, 2; the contrary argument is based on the construction of *gestor*'s approval as being akin a 'private law punishment'.

approval brings about the application of the provisions governing agency and under the rules of agency it is impossible for the principal to approve the actions of the selfish intervenor.[423] It does not matter whether the *gestor* is acting with good faith or not.[424] However, certain decisions from the Turkish Court of Cassation indicate that the principal might indeed subsequently approve the managed business of the *gestor*;[425] although in the case of the bad faithed *gestor* managing the business *sine animus negotia aliena gerendi,* it is also argued that there exists no 'business' for the principal to approve.[426]

Conclusion

"*Negotiorum gestio*" is a uniquely Roman creation originating from roots that were peculiar to the legal and social dynamics of Rome. It was one of the sources of obligation since republican times although was not classified as such until the period of Justinian. The reason for this had more to do with the Roman's general lack of interest towards definitions & categorizations than a theoretical rejection of *negotiorum gestio* as a valid source of obligation.[427]

Starting from pre-classical law, the institution of *negotiorum gestio* covered a wide range of cases due to the activity of the *praetor* in general and the *ex bona fide* wording within its *formula* in specific. Accordingly, the legal boundaries of *negotiorum gestio* were never clearly drawn, even in classical law. And although the modern confusion surrounding the sources owes its debt to the interpolations by the compilers, still, it is also apparent that would have had there been no interpolation of any kind, the confusion would still linger since the expediently flexible character of *negotiorum gestio* was too obvious for the jurists to ignore. It is rather indicatory that Justinian, who saw legal restoration and innovation as the act of harmonization by adding, cutting, or classifying for the sake of clarity (and the elimination of the ancient confusions) did not do much to reform, modify or crystallize '*negotiorum gestio*', leaving the problems and contradictions of classical law unresolved.[428]

Later, jurists of *ius commune* emphasized the flexibility of *negotiorum gestio* which, since pre-classical law, had a lot to do with its place within the *ius pretorium*

423 At most, the principal might opt to waive the rights and claims he holds against the *gestor*.

424 Eren (n 280) 850; Arkan Akbıyık (n 280) 52.

425 For relevant Turkish Court of Cassation decisions, *see* decisions of 15th Civil Chamber of Court of Cassation (*Yargıtay Hukuk Dairesi*) dated 18.01.2001 and numbered 5729/290; of the 3th Civil Chamber of Court of Cassation dated 20.12.2005 and numbered 13997/14128; and of the 4th Civil Chamber of Court of Cassation, dated 04.07.1975 and numbered 7761/8709; also *see* decisions of the General Assembly of the Court of Cassation (*Yargıtay Hukuk Genel Kurulu*/ YHGK) dated 02.11.1968, and numbered 4-977/718; dated 03.06.1964 and numbered 182/392; dated 29.01.1964 and numbered 95/89.

426 Huguenin (n 274) N. 897; Lischer (n 192) 110 et seq.

427 On this disinterest *see* Schulz, *Principles of Roman Law* (n 21) 40 et seq.

428 Özdemir *Vekaletsiz İş Görme* (n 23) 27.

and its *bona fides* character. In the beginning of the age of codification, with the incorporation of new facets in the forms of 'restitution' and 'ideal of help', *negotiorum gestio* had already become something of a "*legal chameleon*".[429] Under the modern paradigm, the 'civil' law on *negotiorum gestio* may include acts of all kinds; with the only exception being 'legal acts concerning strictly personal rights'.[430] In today's practice, the types of business that the *gestor* can undertake is broadly categorized as: the payment of another' debt or liability –supply of necessaries – preservation of as well as improvement on another's property or estate – medical intervention and rescue of another's life and/or limp.[431]

Thus, it is apparent that the subsidiary/complementary nature of *negotiorum gestio* was not confined to Roman law -nor to the *ius commune*- and had been translated to modern law quite successfully. This success is especially remarkable given the uniquely Roman roots of the institution of *negotiorum gestio.* It was a universal and timeless need to find equitable remedies to cases which did not fall under the category of either 'contract' or 'tort'; and the legal framework laid by the Roman jurisprudence did serve and continues to serve as the basis for the many historical and contemporary manifestations of *negotiorum gestio*: The modern 'rights' & 'obligations' as well as the liabilities of both the *domini* and *gestor* are historically linked to the facts within the *formulae*s of the actions of *negotiorum gestorium directa/contra*; as are the prerequisites for the juristic admittance of '*negotiorum gestio*'. Furthermore, the categorical dichotomy of 'genuine' and 'non-genuine' *negotiorum gestio* also finds its origins in the Justinian law while certain modern exceptions or modifications to the degree of parties' liabilities are also of Roman law origins.

It indeed seems highly probable that which started naturally as an isolated practice amongst well off Roman citizens, was first procedurally acknowledged and then juristically furthered and expanded. And while values such as *fides*, *amacitia* and *officium* had served as the moral pillars for the foundation of *negotiorum gestio*, for the jurists it had evolved to become a subsidiary source of obligation in cases where no other recourse was available. The modern *negotiorum gestio* is actually a product of this later development and this complementary flexibility of the institution have already become its natural and indispensable element as evident by its common place within the modern codes of the civil jurisdiction as well as the vaguely encompassing scope of the article 11 of Rome II.[432]

429 Jansen, *Negotiorum Gestio* (n 166) 1116; the phrase '*legal chamelon*' belongs to Jansen.

430 As the acts concerning 'strictly personal rights' cannot be performed via a representative.

431 Stoljar (n 133) 177.

432 Art 11 *negotiorum gestio:* "1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.."

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RESEARCH ARTICLE

International Law in Cyberspace: An Evaluation of the *Tallinn Manuals*

Ebru Oğurlu *

Abstract

While cyber technologies have been advancing since the late 1980s and early 1990s, cyberspace became one of the platforms in which interstate relations occur, ranging from politics and economics to war and conflicts as a result of the mainstreaming of broadband Internet access in the early 2000s. Previously imagined as a platform for free and open communication among people without any state controls or regulations, cyberspace has become one of the main topics of international politics over the last decade. However, laws and policies managing cyberspace have fallen behind the technological developments. Thus, the issue only started to gain the global attention it deserves when modest progress was observed in international law concerning the legal status of cyberspace and the relevant valid principles in the 2000s. State-led cyber operations against Estonia in 2008, Georgia in 2009, and Iran in 2010 supposedly played a significant role in transforming cyberspace into an area of national and international concern. Subsequently, various initiatives have emerged at the international level for adopting internationally recognized cyber rules and principles. Within the framework of Janssens and Wouters' (2022) study *Informal International Law-Making: A Way Around the Deadlock of International Humanitarian Law?*, this work aims to discuss how and to what extent international law can be developed for application in cyberspace by focusing on the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Schmitt [Ed.], 2013) and the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Schmitt [Ed.], 2017), the most comprehensive, albeit non-binding, works published to date on the applicability of existing international law in cyberspace. Using a literature review as its method, the study presents the results of the main legal texts and academic studies and argues that even though the issue has only recently come to the fore as one of the newest areas of international legal systems, the specific rights and duties of states flowing from the age-old principles of international law (i.e., sovereignty, territoriality, and non-intervention) have not become obsolete in this domain.

Keywords

International Law, Cyberspace, Sovereignty, Territoriality, Non-Intervention, Tallinn Manual 2.0, Informal International Law-Making

* **Corresponding Author:** Ebru Oğurlu (Prof. Dr.), European University of Lefke, Faculty of Economics and Administrative Sciences, Department of International Relations, Lefke-Northern Cyprus. Email: eogurlu@eul.edu.tr ORCID: 0000-0003-0538-5985
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I. Introduction

Cyber activities have been a key global concern due to the increasing number and size of hostile cyber operations since the early 2000s. Large-scale cyber operations against Estonia in 2007, Georgia in its war with Russia in 2008, and cyber-attacks targeting Iran's nuclear facilities in 2010 have drawn the attention of states to this issue due to the destabilizing impacts these have over the whole international system. Consequently, cyberspace and its peaceful management have become an integral dimension of both international relations and international law. The increase in the number of cyber operations coupled with the need to identify the responsible actors (whether states or non-state actors) have forced international society and its members to focus on establishing an international mechanism with the involvement of all stakeholders (e.g., states, academia, and private-sector organizations), along with the participation of the United Nations, to maintain international stability by also covering cyber activities.

International law is a legal system with the objective of regulating relations among states as well as their creators (including international organizations) and plays a crucial role in managing interstate relations on various issues. Global governance of cyberspace (i.e., the technical architecture that allows the global Internet to function) and global governance in cyberspace (i.e., how states, industry, and users may use this technology) have emerged as two prominent issues, as states' attention on this domain has been increasing and cyber operations have become more frequent in the international setting. In that sense, the question of whether international law and its established principles apply to cyberspace is not new. However, the issue has only recently started to gain the global attention it deserves.

Cyberspace offers new opportunities and challenges for states in the foreign policy domain. International lawyers recognize it as a cutting-edge issue of international law, considering its legal dimension not just about rules but also about order and strategic competition. In addition, due to cyberspace not being confined to states and their activities, its governance requires multi-actor cooperation, as non-state actors have expressed concern about the implementation of international law in cyberspace. However, the absence of definitive guidance and the normative ambiguity on the issue prevents the adoption of universally binding and approved rules regarding the use of cyberspace by actors in the international system. The objective of this study is to reduce this ambiguity and reveal the basic applicable rules and principles of international law in the context of cyberspace. Recognizing the fact that the responsibility of a state to secure its own network is supported by the internationally recognized concepts of sovereignty, territoriality, and non-intervention, this study accepts the established principles of international law to apply to state activities in cyberspace. Based on this assumption, the first part of the study defines cyberspace,

while later sections examine how the above-mentioned principles are applicable in the context of cyberspace.

II. Cyberspace: Definitional Framework

The term "cyberspace" is widely agreed to have first been coined by William Gibson in his 1984 novel *Neuromancer*. He defined the concept in unthinkable complexity as the "consensual hallucination of data or as a graphic representation of data abstracted from banks of every computer in the human system."[1] As commonly agreed by theorists, academicians, governments, and non-governmental organizations, however, the concept has lacked a definitional consensus.[2] Instead, numerous definitions have been presented in the literature with different focal points. The common aspect of all the definitions is their recognition of cyberspace as a virtual environment that surrounds the whole world,[3] where access to information is provided through different systems including electronic and computer-based technologies. Based on those commonalities, a comparatively more technical definition by the Pentagon states cyberspace to refer to "a global domain within the information environment whose distinctive and unique character is framed by the use of electronics and the electromagnetic spectrum to create, store, modify, exchange, and exploit information via interdependent and interconnected networks using information communication technologies."[4] The technical definition describes the physical dimension of cyberspace as "an environment created by the confluence of cooperative networks of computers, information systems, and telecommunication infrastructures commonly referred to as the World Wide Web."[5]

As a result of the significant developments in technology, information, and communication networks, cyberspace as an unnatural non-territorial setting constructed by humans for human purposes has emerged as the fifth field (i.e., operational space at the national level) where people and/or governments can use the necessary technologies to take action. From this perspective, cyberspace represents a sharp contrast to the four physical and natural spheres of states (i.e., land, sea, air,

1 W. Gibson, *Neuromancer* (Ace Publishing, 1984) p. 54.

2 E. Waltz, *Information Warfare: Principles and Operations* (Artech House Publishing, 1998); D. T. Kuehl, "From Cyberspace to Cyberpower: Defining the Problem," in F. D. Kramer, S. H. Starr, & L. K. Wentz (Eds.), *Cyberpower and National Security* (National Defense University Press, 2009); T. Maurer, "Cyber Norm Emergence at the United Nations - An Analysis of the UN's Activities Regarding Cyber-security" in *Belfer Center for Science and International Affairs Discussion Paper* (2011-11). Retrieved from: https://www.un.org/en/ecosoc/cybersecurity/maurer-cyber-norm-dp-2011-11.pdf

3 V. Güntay, "21. Yüzyıl Paradoksu Olarak Siber Uzay ve Uluslararası Hukuk" (2019) in *Novus Orbis Journal of Politics and International Relations*, *1*(2), 183.

4 Kuehl (n 2) 28

5 W. H. von Heinegg, "Legal Implications of Territorial Sovereignty in Cyberspace" in *Proceedings from 2012 4th International Conference on Cyber Conflict* (NATO CCD COE Publications, 2012) p. 8. Retrieved from: https://www.ccdcoe.org/uploads/2012/01/1_1_von_Heinegg_LegalImplicationsOfTerritorialSovereigntyInCyberspace.pdf

and space)[6] and integrates cyberspace into all these spheres. Thus, one can argue cyberspace to be firmly embedded in the elements of power, one where the national community is involved at a more global level in an anarchic environment connecting millions of networks without any top authority or geographical boundary.[7] In this sense, cyberspace has emerged as a challenge to the established political, social, and economic settings of the international community and has drastically changed the system of "how states govern, how companies deliver services and public goods, how individuals interact with online social networks, and how citizens participate in civil society."[8] Under these conditions, the most complicated task for the whole international system is to determine the legal order of such a complex area, as this has critical significance for state sovereignty and national security.

III. Applicability of International Law in Cyberspace

States form part of an anarchic order in the international system. In this environment, they exist as sovereign equals not subject to any universally accepted legitimate political order and/or central authority. Interstate relations are regulated by international law as a fundamental pillar of a rules-based global system. States obey international law as a result of their habits and concerns about the chaos that may arise in the absence of such rules.[9] Among many other issues, international law is binding regarding states' use and regulation of information and communication technologies (ICTs) and defense against all kinds of malicious operations in an international context.[10] Over time, however, the law may become inadequate due to the technological developments in information and communication networks and their impacts on interstate relations. The emergence of cyberspace as the fifth domain has necessitated the clarification of the legal system in order for an open, safe, and reliable cyber environment to be achieved.

Despite the assumptions regarding the inadequacy of the current form of international law, cyberspace does not operate in a legal vacuum. It does not present a lawless zone where hostile and aggressive activities can be conducted without any

6 A. Liarapoulos, "Power and Security in Cyberspace: Implications for the Westphalian State System" in *Panorama of Global Security Environment* (Bratislava: Centre for European and North American Affairs, 2011), p. 115; S. K. Gourley, "Cyber Sovereignty," in P. A. Yannakogeorgos & A. B. Lowther (Eds.), *Conflict and Cooperation in Cyberspace: The Challenge to National Security* (Taylor & Francis, 2014), p. 278.

7 Şerife Karadağ, "Siber Uzayda Uluslararası Hukuk Mümkün Mü?" (2019) in *International Social Sciences Studies Journal*, *5*(36), 2828; M. C. Libicki, *Cyberdeterrence and Cyberwar* (RAND Corporation, 2009). Retrieved from https://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG877.pdf

8 H. K. Ecemiş Yılmaz, "Siber Uzay, Siber Güvenlik, Dijital Egemenlik Kavramlarının Uluslararası Hukuk Bağlamında Değerlendirilmesi" (2021) in *ULİSA- Mühendislik, Hukuk, İletişim ve İktisat Perspektifinden Siber Güvenlik ve Sosyal Medya*, *12*(9), 21; D. J. Betz & T. Stevens, *Cyberspace and the State: Toward a Strategy for Cyber Power* (Routledge, 2011).

9 F. Sönmezoğlu, *Uluslararası Politika ve Dış Politika Analizi* (Filiz Kitabevi, 2000), p. 644.

10 S. Haataja, "Cyber Operations against Critical Infrastructure Under Norms of Responsible State Behaviour and International Law" (2022) in *International Journal of Law and Information Technology*, *30*(4), 425–429.

restraint. Rather, a general consensus exists among all actors in the international system about the validity of the established rules and principles of international law regarding states' activities in cyberspace, as is the case in non-cyber areas. The legal framework in this domain sets the principles and rules determining what is legal and illegal so as to guide states on how to legally and acceptably behave. These actors assume that "state sovereignty and international norms and principles that flow from sovereignty apply to state conduct of ICT-related activities, and to their jurisdiction over ICT infrastructure within their territory."[11] Regarding their use of ICTs, states additionally have bound themselves to the principles of "sovereign equality, dispute settlement by peaceful means, and non-intervention in the internal affairs of other states."[12] Based on these assumptions, the subject of ongoing discussions is not whether international law applies to state activities in cyberspace but rather how it applies, mostly due to the ambiguity of states in invoking the law or in how they characterize it.[13] The issue is agreeing on the "relevant legal principles that bear on the person, place, object, or type of activity in question."[14]

Cyberspace's lack of a universally binding and well-functioning system of international law, has led to legal uncertainty due to disagreements and interpretative differences, even in the case of agreement regarding the letter and spirit of the law. In addition, the diversity and complexity of actors in cyberspace also makes determining the jurisdiction of international law in cyberspace difficult. With the development of the concept of cyberspace and the increase in its use by different actors in the international community, their interactions have become much more frequent and comprehensive, with vertical and diagonal connections through political, economic, social, and cultural networks.[15] This fact highlights the significance of international "multi-stakeholder governance,"[16] which includes both civil society and private companies in cyberspace management.

Other challenges for cyber governance include uncertainty about the target group for whom the legitimacy of the principles of international law will be valid and the necessity to attribute unlawful behavior to a state if it is blamed for the conduct

11 N. Tsagourias, "The Legal Status of Cyberspace: Sovereignty Redux?" in N. Tsagourias & R. Buchan (Eds.), *Research Handbook on International Law and Cyberspace* (Edward Elgar Publishing, 2021), p. 9; H. Moynihan, *The Application of International Law to State Cyberattacks Sovereignty and Non-intervention* (Chatham House, December 2019). Retrieved from: https://www.chathamhouse.org/2019/12/application-international-law-state-cyberattacks

12 *Ibid*, p. 8

13 *Ibid*, p. 3

14 M. N. Schmitt, "International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed" (2013), in *Harvard International Law Journal Online*, *54*(5), 14. Retrieved from: https://harvardilj.org/2012/12/online-articles-online_54_schmitt/

15 K. Ziolkowski, "Confidence Building Measures for Cyberspace" in K. Ziolkowski (Ed.), *Peacetime Regime for State Activities in Cyberspace - International Law, International Relations and Diplomacy* (NATO CCD COE Publication, 2013), p. 156.

16 D. B. Hollis, *A Brief Primer on International Law and Cyberspace* (Carneige Endowment for International Peace, June 2021). Retrieved from: https://carnegieendowment.org/2021/06/14/brief-primer-on-international-law-and-cyberspace-pub-84763

of unlawful behavior.[17] Because international law only regulates its subjects, such attribution is necessary but equally difficult, considering the existing complications in technical attribution. However, without the identification of who is responsible, deciding whether the issue falls within the framework of international law becomes impossible.[18] Such challenges are becoming more complicated due to the competing claims among states, as well as their substantial interpretative differences, even in the case of common assumptions.

Under these aforementioned difficulties, efforts to solve the problem involve evaluating the specific content of the individual rules to determine whether they are relevant to cyberspace, and if so, how they will be applied through cooperation among states. However, states have largely preferred to remain silent on the clarification of the relevant rules and principles, as well as on how to identify acceptable state behaviors as the basis of customary international law, despite the increased use of cyberspace and the need for regulatory mechanisms. On the other hand, states have individually attempted to strengthen their legal capacity regarding cyber issues and have collectively made efforts to contribute to common laws on cyberspace. In this regard, the 2017 publication, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, constitutes a significant achievement. Although it does not answer all questions and conflictual topics still remain, *Tallinn Manual 2.0* is presented in the next section as "the beginning of a longer and more significant discussion about the formulation of international law concerning cyberspace and its implementation."[19]

IV. The Tallinn Manuals[20]

Tallinn Manual on the International Law Applicable to Cyber Warfare as published in 2013 and the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* as published in 2017 have been prepared as the most comprehensive academic, albeit non-binding, document on the applicability of international law in cyberspace and cyber conflicts. They can be accepted as an attempt at "informal international law-making" and have been proposed by Janssens and Wouters as a "new form of law-making that does not fit into the traditional toolbox of public international law."[21] Informal international law-making emerged as an alternative method of overcoming the deadlock that has been led by states' unwillingness to work on and conclude a formal way of law-making. Through its flexibility, three

17 E. Yılmaz (n 8) pp. 22–23.

18 Hollis (n 16) pp. 3–5.

19 Moynihan (n 11), p. 5.

20 *The Tallinn Manual on the International Law Applicable to Cyber Warfare* (*Tallinn Manual 1.0*) and its successor, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (*Tallinn Manual 2.0*).

21 P. C. Janssens & J. Wouters, "Informal International Law-Making: A Way Around the Deadlock of International Humanitarian Law?" (2022) pp. 104, 920–921. *International Review of the Red Cross*, 2114.

forms of informality distinguish informal international law making from formal and conventional ways: 1) output informality, where the final instrument, whether in the form of memoranda of understanding or as guidelines or declarations, are not recognized as a traditional source of international law; 2) process informality, where cooperation at the global level would take place in a flexibly organized forum or network rather than happening at a conventional diplomatic conference or in a traditional international organization; and 3) actor informality, which in addition to the traditional state actors, would welcome all other actors during and at the end of the negotiations, and states would be represented by those without diplomatic or representative power.[22]

Fitting these characteristics, the Tallinn Manuals were written by experts invited by NATO's Cooperative Cyber Defence Centre of Excellence (CCDCOE) and represent two of the most typical examples of informal international law making. They are not official documents but rather the output of two different interrelated initiatives taken by a group of professionals acting on their own behalf. They do not reflect the formal opinions of any international organization or any state involved in the process. However, the documents have become invaluable sources for legal advisors to governments and for scholars since their publication.

The original document, the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (hereafter called *Tallinn Manual 1.0*), was published in 2013. The focus of *Tallinn Manual 1.0* is on cyber operations that involve force and that take place in the context of armed conflict. Due to the criticisms directed toward *Tallinn Manual 1.0*, mostly because of limited participation from the West and its limited coverage, a follow-up initiative was launched to extend the manual's coverage by also including cyber operations during peacetime. Its revised and expanded version, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (hereafter called *Tallinn Manual 2.0*) was prepared by a more comprehensive international group of experts and published in 2017. With additional rules and modifications, as well as a complete renumbering, *Tallinn Manual 2.0* supersedes the first. One should importantly note that both *Tallinn Manuals* present current international law and its application within the framework of the cyberspace context. Even if the manuals themselves are not binding, "the legal obligations they incorporate are."[23]

Tallinn Manual 2.0 is composed of four parts and is a revolutionary achievement that makes a significant contribution to the theoretical and practical clarification of international law with its focus on cyberspace. Part I is titled "General International

22 J. Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions," in J. Pauwelyn, R. A. Wessel, & J. Wouters (Eds.), *Informal International Law-Making* (Oxford University Press, 2014), pp. 15–20.

23 Janssens & Wouters (n 21) p. 2129.

Law and Cyberspace" and covers sovereignty, due diligence, jurisdiction, law of international responsibility, and cyber operations. Part II presents "Specialized Regimes of International Law and Cyberspace" and covers international human rights law, diplomatic and consular law, law of the sea, air law, space law, and international communication law. Part III deals with "International Peace and Security and Cyber Activities" and is taken mostly from *Tallinn Manual 1.0*. This part covers peaceful settlement, prohibition of intervention, the use of force, and collective security. Part IV presents "The Law of Cyber Armed Conflict" in the general framework of the law of armed conflict, and more specifically through the conduct of hostilities; certain persons, objects, and activities; occupation; and neutrality.[24] Overall, the whole document assumes that states' responsibility to secure the networks within their territories is supported by the principles of internationally recognized sovereignty and non-intervention. Accepting sovereignty as the foundation of international law and non-intervention as its corollary principle, the following part focuses on these two principles and evaluates how it has become possible to apply sovereignty and non-intervention in the cyberspace context by referring to the relevant rules of *Tallinn Manual 2.0*.

A. The Principle of Sovereignty in Cyberspace

While sovereignty signifies the power and supremacy of a state in its traditional definition, sovereignty also emphasizes the territoriality of a state in the framework of international law. However, the fact that "territory is not just a geographical or physical construct but a legal and political construct [referring to the] organization of sovereign power for political and legal purposes"[25] has to be underlined. Due to its nature and the actors involved in it, cyberspace as the fifth field after land, sea, air, and space has challenged the current state-centered system and forced actors in the system to reevaluate key concepts, including sovereignty,[26] security,[27] power,[28]

24 M N. Schmitt (Ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017), pp. v–xi.

25 Tsagourias (n 11), p. 13.

26 D. Hassan, "The Rise of the Territorial State and the Treaty of Westphalia" in G. Morgan (Ed.) *Yearbook of New Zealand Jurisprudence* (University of Waikato School of Law, 2006), pp. 64–67; P. W. Singer & A. Friedman, "Cult of the Cyber Offensive" (2014), in *Foreign Policy*, p. 182. Retrieved from http://foreignpolicy.com/2014/01/15/cult-of-the-cyber-offensive/

27 H. Tiirmaa-Klaar, "Botnets, Cybercrime and National Security" in H. Tiirmaa-Klaar, J. Gassen, E. Gerhards-Padilla, & P. Martini (Eds.) *Springer Briefs in Cyber Security – Botnets* (Springer, 2013), pp. 11–13; Lucas Kello, "The Meaning of the Cyber Revolution" (2013) in *International Security*, *38*(2), 31–32; J. S. Nye, *The Regime Complex for Managing Global Cyber Activities* (The Global Commission on Internet Governance and Chatham House, May 2014), p. 6. Retrieved from: https://www.cigionline.org/static/documents/gcig_paper_no1.pdf ; R. J. Deibert & R. Rohozinski, "Risking Security: Policies and Paradoxes of Cyberspace Security" (2010) in *International Political Sociology*, *4*(1).

28 J. S. Nye, *Cyber Power* (Harvard Kennedy School, Belfer Center for Science and International Affairs, May 2010). Retrieved from: https://www.belfercenter.org/sites/default/files/files/publication/cyber-power.pdf ; J. S. Nye, *The Future of Power* (PublicAffairs, 2011); R. O. Keohane & J. S. Nye, "Power and Interdependence in the Information Age" (1998), *Foreign Affairs*, 77(5).

and actor[29] in terms of the "cybered Westphalian age."[30] Thus, questioning many assumptions that have hitherto been taken for granted has become normal.

Despite its meaning being transformed in the digital and technological age, the principle of sovereignty remains the top priority for all states and frames current international relations.[31] The first rule in *Tallinn Manual 2.0* states, "The principle of State sovereignty applies in cyberspace."[32] If sovereignty symbolizes authority and power, according to *Tallin Manual 2.0*'s first rule, states are supposed to implement their sovereignty over persons, objects, and actions in their cyberspace as they do in their non-cyberspace. The implementation of sovereignty in cyberspace can be interpreted from two perspectives (i.e., rights-based and obligation-/duty-based). As a fundamental principle of statehood, state sovereignty first implies the ultimate authority of any state in terms of its "territorial integrity and political independence."[33] Due to much of what cyberspace consists of existing in the sovereign territories of states and being possessed by governments or companies within state borders,[34] states have authority over the ICT infrastructure that is located within their national territories and openly declare their commitment to protect their national cyber-borders. Thus, the cyber infrastructure is under the jurisdiction of the flag state and its sovereign prerogatives. Specifically, the physical infrastructure needed for cyberspace to function is terrestrial and therefore not exempt from state sovereignty.[35]

Because damage in cyberspace is a real possibility, states cannot afford to leave it uncontrolled, despite the difficulty in imposing their sovereignty over this borderless area. Instead, what cyberspace and cyber-management need is state regulations and governmental rules.[36] In this sense, states have the right to manage their cyberspace and to provide a secure environment for its healthy functioning. Accordingly, the sovereignty principle is applied to states' cyber activities as an

29 T. Lan & Z. Xin, "Can Cyber Deterrence Work?" in A. Nagorski (Ed.), *Global Cyber Deterrence: Views From China, The U.S., Russia, India, and Norway* (East-West Institute, 2010), p. 1; K. F. Rauscher, *First Joint Russian-U.S. Report on Cyber Conflict* (EastWest Institute, 2011). Retrieved from: https://www.eastwest.ngo/idea/towards-rules-governing-cyber-conflict-0 ; C. C. Demchak & P. Dombrowski, "Rise of a Cybered Westphalian Age" (2011) in *Strategic Studies Quarterly*, *5*(1), 54–57; N. Kshetri, "Cybercrime and Cyber-security Issues Associated with China: Some Economic and Institutional Considerations" (2013) in *Electronic Commerce Research*, *13*(1).

30 Demchak & Dombrowski (n 29), p. 35.

31 P. W. Franzese, "Sovereignty in Cyberspace: Can It Exist?" (2009), *Air Force Law Review*ö *64*.

32 Schmitt (n 24), p. 11.

33 von Heinegg (n 5), p. 8; S. Couture & S. Toupin, 'What Does the Notion 'Sovereignty' Mean When Referring to the Digital?" (2019), in *New Media & Society, 21*(10), 4–6.

34 Liarapoulos (n 6), p. 37; Betz & Stevens (n 8).

35 Gourley (n 6), pp. 279–286; von Heinegg (n 5), p. 8; M. N. Schmitt, "International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed" (2013), in *Harvard International Law Journal Online*, *54*(5). Retrieved from: https://harvardilj.org/2012/12/online-articles-online_54_schmitt/ ; G. L. Herrera, "Cyberspace and Sovereignty: Thoughts of Physical Space and Digital Space," in M. Dunn-Cavelty, V. Maurer, & S. F. Krishna-Hensel (Eds), *Power and Security in the Information Age: Investigating the Role of the State in Cyberspace* (Ashgate, 2007), p. 68.

36 M. Carr, *US Power and the Internet in International Relations: The Irony of the Information Age* (Palgrave Macmillan, 2016); T. H. Wu, "Cyberspace Sovereignty? The Internet and the International System" (1997), in *Harvard Journal of Law & Technology*, *10*(3), 649–656.

outcome of their abilities "to regulate such matters within territorial borders and to exercise power."[37] In light of disagreements and uncertainties, a blurring of borders appears to exist among "sovereignty over cyberspace, sovereignty in cyberspace, and no cyber sovereignty,"[38] despite the concept of sovereignty in itself being well-understood. Accordingly, each state is given the right to determine the relevant rules and principles for governing cyberspace within its borders. Thus, "cyberspace is not immune to state sovereignty."[39] On the contrary, any state can declare "its sovereignty by exercising its jurisdiction over the cyber infrastructure located on its territory, over its nationals within its territory as well as over non-nationals, including legal persons such as companies within its territory."[40] This statement implicitly refers to different dimensions of cyberspace, technically called the layers of cyberspace. The physical layer of cyberspace consists of "the physical network components, i.e., computers, integrated circuits, cables and communications infrastructure." The logical layer comprises "connections which exist between network devices and allow the exchange of data across the physical layer." The social layer includes "human beings engaged in cyber activities."[41] Sovereignty can be asserted over each of these.

On the other hand, the principle of sovereignty also imposes obligations on states "to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in a foreign territory."[42] From this perspective, sovereignty clearly prohibits specific types of cyber activities that may range from unauthorized conduct of cyber activities by a state present in another state's territory or remote cyber operations leading to the physical damage in the territory of another state in order to interfere with the use of governmental functions by the territorial state. *Tallinn Manual 2.0* clarifies this with the following statement: "A state must not conduct cyber operations that violate the sovereignty of another State." It is also clearly states, "States have sovereignty over cyber infrastructures in their own countries, and attacks on these infrastructures are unlawful."

Three core rights are embodied in the sovereignty principle. These include "the right to territorial integrity" (i.e., territorial/internal sovereignty as discussed in Rule 2), "the right to independence of state powers" (i.e., political independence), and "the equality of states in the international system" (i.e., external sovereignty as discussed in Rule 3). States' rights in relation to their land, air space, and all maritime zones

37 Russell Buchan, *Cyber Espionage and International Law* (Hart Publishing, 2019 [2018]), p. 50.

38 Gourley (n 6), p. 288.

39 *Ibid* pp. 286–287.

40 Tsagourinas (n 11), p. 14.

41 N. Tsagourias, "Law, Borders and the Territorialisation of Cyberspace," (2018), in *Indonesian Journal of International Law*, *15*(4), 539.

42 von Heinegg (n 5), pp. 8–9.

are covered by the sovereignty principle. These rights include the rights of states regarding their political independence and jurisdiction with the condition that they act within the confines of international law. This condition forces each and every state to recognize the independence and authority of other states while enjoying the privileges intrinsic to their sovereignty. Such a statement shows the wholeness of the three dimensions of sovereignty (i.e., internal sovereignty, political independence, and external sovereignty).

Because treaty provisions and customary law safeguard states' sovereignty and territorial integrity, they also provide the basis for states' claims prohibiting the use of force against their sovereignties.[43] According to these statements, cyberspace is thus "not immune from state sovereignty and from the exercise of jurisdiction."[44] Applying the sovereignty principle to cyberspace, the debate revolves around how and the extent to which sovereignty applies to cyberspace.[45] As indicated below, Rules 2, 3, and 4 in *Tallinn Manual 2.0* are clear about the applicability of sovereignty to cyberspace. In accordance to what Rule 2 states, a "state enjoys sovereign authority with regard to the cyber infrastructure, persons, and cyber activities located within its territory, subject to its international legal obligations."[46] As Rule 3 provides, a "state is free to conduct cyber activities in its international relations, subject to any contrary rule of international law binding to it"[47] As Rule 4 indicates, "a state must not conduct cyber operations that violate the sovereignty of another state."[48]

The debate here is how a state, being a territorial entity, can exercise its traditionally structured sovereignty in a non-regional borderless area.[49] Considering the activities contravening the non-intervention principle as a violation of the sovereignty principle in itself, the principle of non-intervention and its implementation can be recognized as the answer to this question.

B. State Jurisdiction and Territoriality of International Law

Jurisdiction as a principle of international law refers to "the competence of a state to govern matters on its territory and provides the link between the sovereign government and its territory, and ultimately its people… [Which directly relates to] making, adjudicating, interpreting, and enforcing the law as well as rule making"[50] and

43 Moynihan (n 11), pp. 11–12.

44 Von Heinegg (n 5), p. 9.

45 Nicholas Tsagourias (n 11), pp. 19–24.

46 Schmitt (n 24), pp. 13–16.

47 *Ibid*, pp. 16–17.

48 *Ibid*, pp. 17–27

49 E. Yılmaz (n 8), p. 24.

50 C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2019 [2008]), p. 5; J. Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed., 2012), p. 448.

derives from the principle of sovereignty. As discussed above, because sovereignty is predominantly territorial under international law, the traditional approach regarding the basis of jurisdiction is also reinforced by the principles of territoriality, non-intervention, and state consent, which represent a clear manifestation of sovereign authority.[51] Overall, these principles restrict the power of a state to its own territories and prevents states from enforcing their jurisdiction within the territory of other states without the latter's consent.[52]

The exercise of power by any state violating any other state's sovereignty will most likely result in conflicts. Because jurisdiction under international law aims at preventing these kinds of conflicts, public international law has developed principles to be used as the justification for state jurisdiction regarding issues in their territories. States mostly link the matter to their territory "by means of connecting factors."[53] Thus in principle and under international law, as written in Rule 9 in *Tallinn Manual 2.0* "Every state is entitled to exercise three forms of jurisdictional competence (prescriptive, enforcement, and judicial) over persons and objects located on its territory, as well as conduct occurring there." According to the same rule and referring to the scope of this study, "A sovereign state may exercise territorial jurisdiction over cyber infrastructure and persons engaged in cyber activities on its territory; cyber activities originating or being completed in its territory, or cyber activities having a substantial effect on its territory."

In recent times, however, the territorial model of jurisdiction has become inadequate for managing the challenges caused by ever-increasing cross-border transnational cyber activities (e.g., cloud computing as the leading one among others). Cloud computing means "the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself."[54] This leads to the possibility that significant portions of personal data could be stored in remote data-centers and has become the favored way of data storage in the age of contemporary computing practices. In this sense, cloud computing provides an opportunity to explore the idea of a "new spatiality"[55] and presents an interesting case challenging the current state-centric global order and traditional understanding of a number of legislative issues involving the territoriality of jurisdiction. Technological developments related to cloud computing have had at least two main impacts relevant to scope of this paper. First, service providers may store their data on networks where their servers are

51 Crawford (n 50), pp. 456, 479.

52 S. Allen, "Enforcing Criminal Jurisdiction in the Clouds and International Law's Enduring Commitment to Territoriality" in S. Allen, D. Costelloe, M. Fitzmaurice, P. Gragl, & E. Guntrip (Eds.), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press, 2019), p. 4.

53 J. Hörnle, *Internet Jurisdiction - Law and Practice* (Oxford University Press, 1st ed., 2019), p. 5.

54 Allen (n 52), p. 6.

55 G. Dannat, *How Cloud Computing Complicates the Jurisdiction of State Law* (E-International Relations, 14 September 2012). Retrieved from https://www.e-ir.info/2012/09/14/how-cloud-computing-complicates-the-jurisdiction-of-state-law/

located in a different jurisdiction than that of the relevant data owner. Secondly, cloud computing systems makes setting up the national setting difficult for any particular datum stored in the cloud of any given service provider.[56]

Significance is had in acknowledging that, despite its considerable advantages for users and service providers, cloud computing creates uncertainties about states' jurisdiction powers. The nature of cloud computing and data storage involving cross-border data transfers or data in transit through many jurisdictions has blurred national boundaries and posed several challenges for the practice of territorial jurisdiction. On the contrary, the appearance of cloud services in different jurisdictions gives rise to the emergence of a number of states attempting to claim different forms of jurisdiction over particularly specified cyber activities. Thus, applying territoriality on a strictly conventional basis has also become difficult. Under these conditions, problems related to online activities and remote data storage, as well as the complex nature of cyber activities, have necessitated global cooperation to evaluate the viability of maintaining a territorial conception of jurisdiction in "digital settings and, especially, cloud environments."[57] The results of these efforts will show how flexible and successful international law is in adapting itself to changing conditions.

As stated in the above sections, another principle underpinning the traditional territorial approach to jurisdiction is non-intervention and is discussed in the following section.

C. The Principle of Non-Intervention in Cyber-Space

The non-intervention principle as a reflection of sovereignty signifies each state's claim to its territorial integrity and political independence. As a corollary to sovereignty and sovereign equality, the prohibition of intervention has long been recognized in political and legal circles, despite its definitional ambiguity and conceptual uncertainty. In compliance with the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN, "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law."[58] In addition, the Court of International Justice recognizes this as part of customary international law.

56 Allen (n 52), pp. 9–10.

57 *Ibid*, pp. 5–6.

58 For the full text, see: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/pdf/NR034890.pdf?OpenElement

The above statements show the principle of non-intervention to exist and to prohibit "action attributable to a state involving 'methods of coercion' regarding the internal or external affairs of a state."[59] This state of affairs has been carried over into the cyber context by *Tallinn Manual 2.0.* The manual discusses the prohibition of intervention regarding two separate rules: Rule 66 (i.e., Intervention by States) and Rule 67 (i.e., Intervention by the UN). Rule 66 states that "a state may not intervene, including by cyber means, in the internal or external affairs of another State."[60]

According to the conventional understanding, a violation of the territorial sovereignty of any state is naturally linked to the physical intrusion into the territory of a state, irrespective of whether this occurs by land, sea, or air. Although cyberspace interactions are often de-territorialized, cyberspace and its three intertwined layers (as mentioned in the previous sections) are encapsulated in the principles of sovereignty and non-intervention. Furthermore, the principle of non-intervention clearly codified in international legal documents as well as agreements prohibits a state from intervening within another state's sovereign territories and causing damages to their activities, including those in and from cyberspace.

V. Conclusion

The increasing use of technology since the 1990s has made cyberspace a new area of operation for members of the international community. Thus, cyberspace has become increasingly subjected to complicated, large-scale, state-led operations. Just as cyberspace has made very important contributions to the history of human development, many harmful incidents have also originated from this arena. Critical national infrastructure has become vulnerable to cyber-attacks. International stability may be endangered by cyber wars or cyber conflicts. International economics may be threatened by cybercrime and cyber espionage, and individuals are being terrorized by hackers. In order to overcome those challenges, an open, safe, stable, accessible, and peaceful cyberspace is needed for all. Consequently, the international community has been taking steps in various multi-lateral and multi-stakeholder platforms.

Cyberspace opens up a host of new legal questions, and states, legal experts, and business actors have been discussing and focusing on the issue of how to regulate cyberspace through international law since the mid-1990s. The starting point of these debates places state sovereignty as the basis of international law giving jurisdiction to states. However, due to the relatively new nature of cyber actions and activities, a binding and universal legal order and system has so far not been established. The

59 D. B. Hollies, "From Corollaries to Contents? Elaborating the Principle of Non-intervention in Cyberspace," in F. Delerue & A. Géry (Eds.) *International Law and Cybersecurity Governance* (European Union Institute for Security Studies, 2022), p. 52.

60 Schmitt (n 24), pp. 312–325.

complex structure of the issue prevents the establishment of binding rules in the international arena. Due to the voluntariness of current rules and non-existence of a binding mechanism to supervise them, their application and implementation are mostly subject to the political will of each state.

The view is that states should have an active role in the creation of international legal rules in accordance with the concepts of cyberspace. Development in this field is only possible through interstate cooperation, and this is a burgeoning area of law. Although a need exists for new approaches to existing problem, *Tallinn Manuals 1.0* and *2.0* appear to provide the basis and starting point for further laws and regulations regarding cyberspace. As the manuals show, a sovereignty redux definitely occurs in cyberspace, along with the continuing disputes about its scope and content. Because these are the states of the international society that make international law and are responsible for this uncertainty, they again have the power and capacity to reduce this uncertainty and clarify the legal understanding. The successful implementation of international law in cyberspace will depend on minimizing the disagreements among members of the international community.

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Corr v IBC Vehicles Ltd [2008] UKHL 13, [2008] 1 AC 884.

R (Roberts) v Parole Board [2004] EWCA Civ 1031, [2005] QB 410.

Page v Smith [1996] AC 155 (HL).

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Callery v Gray [2001] EWCA Civ 1117, [2001] 1 WLR 2112 [42], [45].

Bunt v Tilley [2006] EWHC 407 (QB), [2006] 3 All ER 336 [1]–[37].

R v Leeds County Court, ex p Morris [1990] QB 523 (QB) 530–31.

If citing a particular judge:

Arscott v The Coal Authority [2004] EWCA Civ 892, [2005] Env LR 6 [27] (Laws LJ).

Statutes and statutory instruments

Act of Supremacy 1558.

Human Rights Act 1998, s 15(1)(b).

Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166.

EU legislation and cases

Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 5.

Case C–176/03 *Commission v Council* [2005] ECR I–7879, paras 47–48.

European Court of Human Rights

Omojudi v UK (2009) 51 EHRR 10.

Osman v UK ECHR 1998–VIII 3124.

Balogh v Hungary App no 47940/99 (ECHR, 20 July 2004).

Simpson v UK (1989) 64 DR 188.

Secondary Sources

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Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268.

Gareth Jones, *Goff and Jones: The Law of Restitution* (1st supp, 7th edn, Sweet & Maxwell 2009).

K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).

Contributions to edited books

Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks (OUP 2006).*

Encyclopedias

Halsbury's Laws (5th edn, 2010) vol 57, para 53.

Journal articles

Paul Craig, 'Theory, "Pure Theory" and Values in Public Law' [2005] PL 440.

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Online journals

Graham Greenleaf, 'The Global Development of Free Access to Legal Information' (2010) 1(1) EJLT < http://ejlt.org//article/view/17 > accessed 27 July 2010.

Command papers and Law Commission reports

Department for International Development, *Eliminating World Poverty: Building our Common Future* (White Paper, Cm 7656, 2009) ch 5.

Law Commission, *Reforming Bribery* (Law Com No 313, 2008) paras 3.12–3.17.

Websites and blogs

Sarah Cole, 'Virtual Friend Fires Employee' (*Naked Law*, 1 May 2009)

<www.nakedlaw.com/2009/05/index.html> accessed 19 November 2009.

Newspaper articles

Jane Croft, 'Supreme Court Warns on Quality' *Financial Times* (London, 1 July 2010) 3.

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